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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

RUBEN H. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the imposition of a restitution order of $4,566,298.00 which includes more than four million dollars for "losses" not caused by the offenses of conviction and which is contrary to this court's mandate in *Hughey v. United States,* 495 U.S. 411 (1990) is a manifest injustice which should be reviewed by this court.

2. Whether Ruben Johnson was denied due process of law by the imposition of an illegal $4,566,298.00 order of restitution which has, in response to Johnson's Rule 35(a) motion, been summarily affirmed by the trial court and the appellate court without the required de novo review.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit are as follows: Ruben H. Johnson and United States of America.

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PETITION FOR WRIT OF CERTIORARI

Ruben H. Johnson, the plaintiff below and the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 27, 1998 and issued as judgment on September 8, 1998.

OPINION BELOW

The judgment entered September 8, 1998 by the United States Court of Appeals for the Fifth Circuit is reprinted at Appendix A and is sought to be reviewed.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered by order dated September 8, 1998 following a July 27, 1998 unreported opinion and the denial of petitioner's petition for rehearing order dated August 28, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Amendment XIV

. . . nor shall any state deprive any person of life, liberty, or property without due process of law . . .

Fed.R.Crim.Pro. 35. Correction or Reduction of Sentence

> (a) **Correction of Sentence**. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) **Reduction of Sentence**. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.[1]

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Ruben H. Johnson, ("Mr. Johnson") was indicted Sept. 6, 1988 on thirteen counts of misapplication of bank funds under 18 U.S.C. § 656 for offenses on or

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[1] Federal Rule of Criminal Procedure 35(a) provides for the correction of illegal sentences. The Rule was completely revised in 1984, but the revised Rule applies only to offenses committed after November 1, 1987. Because appellant's offense was committed prior to 1987, Rule 35 in effect prior to the 1984 revisions applies to this case. The applicable Rule 35(a) provides that "[t]he court may correct an illegal sentence at any time."

about September 20, 1983 and continuing through September 10, 1984. App. 78-86. Mr. Johnson pleaded not guilty and, following a jury trial, was found guilty on all counts on April 24, 1989. App. 76, 77. At the sentencing hearing on July 20, 1989, Mr. Johnson was sentenced to 8 years of confinement and 5 years of supervised probation, ordered to pay a $65,000 fine and $4,566,298 in restitution, and ordered to perform 500 hours of community service. App. 95-97. The Judgment and Probation/ Commitment Order was entered on July 20, 1989. App. 71-75. Restitution was ordered pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3579, 3580 (recodified at 18 U.S.C. §§ 3663, 3664) ("VWPA"). App. 72. Honorable James R. Nowlin of the United States District Court in the Western District of Texas, Austin Division, presided at trial and sentencing.

Mr. Johnson was incarcerated from August 21, 1989 to July 1, 1994. He completed his parole and his community service and is currently on supervised probation, living and working in Austin, Texas. He has paid all monthly payments on his restitution, as required by his probation officer, and is currently paying $500.00 per month. Mr. Johnson is now sixty-nine years old.

On May 3, 1989, after conviction and prior to sentencing, Mr. Johnson filed a Notice of Appeal of his conviction, but withdrew his appeal upon advice of counsel on October 20, 1989.

On July 19, 1989, prior to sentencing, Mr. Johnson filed a Written Objection to the Presentence Investigation Report, pursuant to Rule 32(c)(3)(A), complaining, inter

alia, about the amount of restitution claimed by the government. At sentencing, Mr. Johnson's counsel reiterated his written objections and also orally objected to the amount of the restitution. App. 89-93. The objections were overruled. App. 93.

On January 27, 1992, Mr. Johnson filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 ("the 2255 Motion"), on two grounds – multiplicity and that the restitution exceeded the amount of loss to the victim. On May 20, 1992, the magistrate submitted his report and recommendation that the 2255 Motion be denied. App. 65-70. On June 15, 1992, Mr. Johnson filed objections to the magistrate's report. App. 60-64. On June 30, 1992, the trial court adopted the magistrate's report and denied the 2255 Motion. App. 57-59. The Court of Appeals for the Fifth Circuit affirmed the denial of the 2255 Motion on May 6, 1993 and issued an unpublished per curiam opinion. App. 54-56.

On September 2, 1997, Mr. Johnson filed a Motion to Correct Sentence pursuant to Rule 35(a), Fed. R. Crim. Pro. App. 17-53. ("Rule 35(a) Motion") The trial court summarily denied the Rule 35(a) Motion on Oct. 3, 1997, holding that the issue was fully and finally resolved by its adjudication of the 2255 Motion and the Fifth Circuit's affirmance, and holding that Mr. Johnson, by abandoning his direct appeal, waived his ability to attack the restitution order. App. 13-16. Mr. Johnson appealed the denial of the Rule 35(a) Motion and on July 27, 1998 the Court of Appeals for the Fifth Circuit, in an unpublished opinion, affirmed the trial court's judgment holding that the appellate court lacked jurisdiction because Mr. Johnson's motion was untimely. App. 2, 3. Mr. Johnson filed a

Petition for Rehearing on August 14, 1998. App. 5-11. That petition was summarily denied on August 28, 1998, without opinion. App. 4. The July 27, 1998 opinion of the Fifth Circuit was issued as a mandate in a judgment dated September 8, 1998. App. 1.

This petition for writ of certiorari is due to be filed within ninety days from September 8, 1998.

B. Statement of the Facts

The Judgment and Probation Commitment Order ("the judgment") provides that the defendant is to pay restitution " . . . to compensate FDIC for losses *incurred during the commission of the offense.*" (emphasis added) App. 72. However, the dollar amount of restitution ordered in the judgment is on its face contrary to the indictment. Compare App. 72 to App. 78-86.

1. Offense of Conviction. Mr. Johnson was indicted for and convicted of misapplying bank funds. Each of the 13 counts in the indictment listed one specific instance of misapplication of bank funds on a specific date, in an amount "over $100," "through the funding" of a United Bank voucher in a specific amount. (emphasis added). App. 78-86. For example, Count 1 stated:

> " . . . On or about September 20, 1983, in the Western District of Texas, Defendant, Ruben Johnson, knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied *more than $100.00* of the moneys, funds and credits belonging to the bank and intrusted to its care and custody *through the funding of a United Bank of Texas expense voucher in the approximate amount of*

> *$31,529.64*, in violation of Title 18, U.S.C., Section 656." (emphasis added). App. 78, 79.

The amounts of the expense vouchers included in all thirteen counts total $731,609.46. App. 78-86. The dates of the offenses in the counts ranged from September 20, 1983 through September 10, 1984. App. 78-86.

2. Government's Theory and Evidence of the Offense of Conviction. It is undisputed that at the time of the offenses, Mr. Johnson was Chief Executive Officer and Chairman of the Board of the United Bank of Texas ("the bank"). George Zapalac ("Zapalac") was hired by the bank to complete finish-out in the bank's space. The government's theory from the beginning and through conviction was that Zapalac "padded" his invoices to United Bank with a fee (alleged kickback) for Mr. Johnson. Each of Zapalac's invoices were paid to him by the bank through the funding of an expense voucher, the same expenses vouchers described in the thirteen counts of the indictment. After he received payment from the bank, Zapalac would then write a check to Mr. Johnson for his fee. It follows that only the "padded" portions, i.e., the portion of Zapalac's invoices which were ultimately paid to Mr. Johnson for the invoices funded through the 13 expense vouchers listed on the indictment, could constitute the loss to the victim. The government's evidence established that Mr. Johnson received a 15% fee on all finish-out Zapalac performed for the bank. There was *no evidence* that Mr. Johnson ever received more than 15% of the specific expense vouchers listed in the 13 counts of the indictment. Therefore, the loss could not exceed 15% of $731,609. or $109,741. Yet, the court ordered $4,566,298 in restitution.

3. Government's Basis of the $4,566,298 Restitution Actually Ordered. The trial court ordered Mr. Johnson to pay restitution of $4,566,298. That figure included $394,298 for all fees *ever* received by Mr. Johnson from Zapalac (as opposed to the fees related to the expenses vouchers and time periods listed in the indictment) and $4,172,000 related to alleged losses of the bank related to leased space, (totally unrelated to offense).

(a) Government's basis for the $394,298 figure. The government's calculated amount included all the "fees" the government could document Mr. Johnson received from tenant finish-out on the United Bank Building. App. 92. Clearly, this amount included 15% fees he received on expense vouchers not listed in the counts of the indictment, and expense vouchers not issued during the time period of the commission of the offense. The government's factual basis for claiming this portion of the restitution is more fully explained in the Rule 35(a) Motion. App. 32-38.

(b) Government's basis for the $4,172,000 figure. At the sentencing hearing, the court summarized from the presentence report the alleged basis for this $4,172,000.00 loss as:

> " . . . *space leased by the bank* that was in excess of the space approved by the FDIC needed by the bank, the space that the bank never wanted or used, *resulted in charges to the bank, . . . of 4.172 million dollars. . . . This figure does not include the finishing out cost charged to the bank,* which was substantial or any other cost for taxes, insurance, et cetera, that the bank had to pay for the extra space." App. 91.

The prosecutor's response to Mr. Johnson's objection to this amount was:

> "With regard to the extra lease space, that is, the 4.172 million dollars, there was a great deal of time during the trial dedicated to demonstrating to the jury that Mr. Johnson caused the bank to lease this excessive amount of space at great cost to the bank. That was a part of his fraud. That was a part of the evidence. And that ought to be a part of the restitution." App. 92, 93.

The crime Mr. Johnson was charged with involved his receipt of fees through misapplication of funds related to 13 specific expense vouchers issued on specific dates for specific amounts. The indictment did not charge Mr. Johnson with any crime related to space he allegedly caused the bank to lease. Throughout the trial, when allowing evidence about the leases to come in, the judge was very careful to allow it in for a limited purpose – not to show guilt of the crimes charged, but to show motive. There was no jury finding that Mr. Johnson was guilty of any crime other than the crimes alleged in the indictment. App. 76, 77. The government's basis for this part of the restitution, and the evidence which was developed at trial and in the sentencing phase, as well as Mr. Johnson's arguments for why this portion of the restitution is illegal, are more fully developed in the Rule 35(a) motion. App. 23-32.

REASONS FOR GRANTING THE WRIT

The restitution order complained of in Mr. Johnson's Rule 35(a) Motion is illegal, constitutes plain error and

violates due process. The lower courts' failure to rule on the merits of the motion in accordance with this court's mandate in *Hughey v. U.S.*, 495 U.S. 411 (1990) constitutes a complete miscarriage of justice which requires examination by this Court. As explained in detail above, the lion's share of the 4.566 million dollar restitution order is for amounts unrelated to the offenses of conviction and were not losses caused by the acts specified in the thirteen specific counts of the indictment. App. 78-86.

A. Misapplication of Law Results in a Manifest Injustice.

When the trial court denied Mr. Johnson's Rule 35(a) Motion, the court concluded that because the Fifth Circuit affirmed the denial of Mr. Johnson's previously filed Motion to Vacate, Set Aside or Correct Sentence brought pursuant to 28 U.S.C. § 2255 ("the 2255 Motion"), App. 13-16, the trial court, following the "law of the case," was required to deny the Rule 35(a) Motion since it too attacked the amount of the restitution order. In affirming the trial court's denial of the Rule 35(a) Motion, the Fifth Circuit did not rule on the merits of the motion but instead, held the appellate court lacked jurisdiction because Mr. Johnson's motion was untimely. App. 2.

Each of these stated reasons for denying relief to Mr. Johnson by both the trial court and the appellate court and the effect of those holdings will be addressed below.

1. Trial Court's "Law of the Case" Argument.

In denying Mr. Johnson relief on his Rule 35(a) motion, the trial court argued that the law of this case is that the argument raised by Mr. Johnson – that *Hughey* should be applied retroactively to his restitution order – was determined in the trial court's prior denial of Mr. Johnson's 2255 Motion and by the Fifth Circuit's affirmation of that denial. In that unreported opinion, the Fifth Circuit held that Mr. Johnson, by abandoning his direct appeal, waived the right to attack the restitution order. App. 54-56.

The law of this case is not that the restitution order is legal or that *Hughey* should not be applied retroactively to the restitution order at issue. The law of the case, if there is any, could only be that because Mr. Johnson abandoned his appeal, he waived the ability to complain about the restitution order. If this is "the law" of this case, then it is incorrect law and, as argued below, is contrary to case law within the 5th Circuit and other circuits.

Mr. Johnson is not precluded from asserting illegality of the restitution order under Rule 35(a). A 2255 motion and a Rule 35 motion are different. As the Fifth Circuit itself has stated, a Rule 35 motion is reviewed under a less strict standard than a 2255 Motion. *United States v. Stumpf*, 900 F.2d 842, 845 n. 2 (5th Cir. 1990). The Fifth Circuit's holding that Mr. Johnson waived the issue of the legality of the restitution order because he did not appeal is incorrect. The plain language of Rule 35(a) states that a motion may be brought at any time. *Hill v. United States*, 368 U.S. 424, 430 (1962). One cannot waive the right to complain about the illegality of a sentence. *United States*

v. Lopez, 428 F.2d 1135, 1138 (2d Cir. 1970), *U.S. v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991). A Rule 35(a) motion does not require an appeal and can be brought at any time. *Callanan v. United States*, 364 U.S. 587, 589 n. 3 (1961).

In *Lopez*, the defendant filed a Rule 35 motion to complain about fines imposed by the trial court. In response, the government argued that because *Lopez* had not raised the issue on appeal, he waived the right to raise the illegality argument. The appellate court disagreed. The court held that although it might have been better to raise the illegality of the sentence on direct appeal, *Lopez* did not waive his right to bring a Rule 35 motion because the court may correct an illegal sentence at any time. *Lopez*, 428 F.2d at 1138.

Even if it were correct that under the law, Mr. Johnson had somehow procedurally missed his opportunity to raise illegality in a Rule 35(a) Motion, the appellate court should have, on its own motion, found on the face of the record that the sentence imposed was in and of itself illegal. If error is plain on the record, it should be dealt with by the court of appeals. *Bartone v. United States*, 375 U.S. 52, 54 (1963). *See also U.S. v. Wainwright*, 938 F.2d 1096, 1098 (imposition of an illegal sentence is plain error which should be noted even if it was not raised in the trial court, relying on Rule 52(b) Fed. R. Crim. P. which states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.").

In *U.S. v. Buechler*, 557 F.2d 1002 (3rd Cir. 1977), the defendant filed a Rule 35 Motion on the grounds that her

sentence was imposed illegally. The appellate court agreed that the trial court correctly denied relief because the motion was not timely filed. Despite that ruling, the appellate court vacated the sentence because it concluded on its own that the district court lacked authority to order restitution in an amount greater than the loss caused by the offense for which *Buechler* was convicted. *Id.* at 1002, 1007.

Similarly, in *Robinson v. United States* and *Westmoreland v. United States*, 333 F.2d 323 (8th Cir. 1964), the Eighth Circuit held that although there were procedural grounds on which to base dismissal of both appeals, the court was constrained to notice "plain error" appearing on the face of the record and that to refuse to address such error would be a miscarriage of justice. *Id.* at 323, 324. The *Robinson/Westmoreland* court further held "This court is at liberty to and will reverse even in the absence of a proper motion and exception . . . to guard against injustice" *Id.* at 326, citing *Cox v. United States*, 96 F.2d 41 (8th Cir. 1938).

The clear mandate from these cases is that the court should not get mired down in procedural missteps. Justice and the law require the court to address plain error when it is evident, no matter how it is brought to the court's attention.

The ends of justice would be served by reaching the merits of Mr. Johnson's motion. As was pointed out above, Mr. Johnson has been ordered to pay an illegal restitution of over $4.5 million dollars. It is not just for this man to live the remainder of his life under the

onerous, illegal restitution order imposed with the attendant ingenious collection efforts which have been undertaken by the federal government. The difference between what Mr. Johnson was ordered to pay and the amount of the "kickbacks" proven at trial is four million four hundred and fifty-six thousand, five hundred and fifty-six dollars and $^{59}/_{100}$ Dollars ($4,456,556.59), *over 40 times what Mr. Johnson should have been ordered to pay ($109.741.00).* An illegal order of this magnitude constitutes a manifest injustice which should be addressed by this Court.

2. Appellate Court's Argument that Rule 35(a) Motion was not Timely.

The Fifth Circuit refused to consider the merits of Mr. Johnson's Rule 35(a) Motion, concluding the motion was untimely. In support of its holding, the Appellate Court cited *In re United States,* 900 F.2d 800 (5th Cir. 1990). As was pointed out in Mr. Johnson's Motion for Rehearing, App. 5, the appellate court's reliance on *In re United States* is misplaced. In *In re United States,* the court reduced a sentence well after the 120-day time limit provided for in Fed. R. Crim. Pro. 35(b) had passed. The appellate court held the time limit imposed by Rule 35(b) was jurisdictional and concluded that the trial court had no jurisdiction to *reduce the sentence* of defendants. *In re United States,* 900 F.2d at 803. Mr. Johnson filed his motion pursuant to Rule 35(a) to correct an illegal sentence. There is no time limitation. Mr. Johnson contends the restitution order in his case is illegal, not that it was imposed in an illegal manner. He did not seek to reduce his sentence. He seeks to vacate his restitution order and have the case

remanded to the trial court for entry of a correct order. *In re United States* is inapplicable to Mr. Johnson's case.

B. Imposition of an Illegal Restitution Order Violates Due Process.

As shown in the facts outlined above, Mr. Johnson was ordered to pay, as restitution: (1) all sums allegedly received by him for "kickbacks" for the pay vouchers referenced in the thirteen counts of the indictment, (2) all sums allegedly ever received by Mr. Johnson from the contractor, Zapalac; and (3) all monies the bank supposedly lost as payments on its leased space. Categories 2 and 3 are wholly unrelated to the offenses of conviction. Ordering Mr. Johnson to pay for losses not related to the offense of conviction runs afoul of due process. "To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." See *H.R. Rep. No. 99-334*, p. 7 (1985) (citing to *H.R. Rep. No.* 98-1017, p. 83, n. 43 (1984)). *Hughey* at 420, n. 5.

The indictment gives the defendant notice of the charges against him and lets the defendant know what charges he needs to defend. Given the very specific indictment in this case, App. 78-86, Mr. Johnson certainly had no notice he was to defend against charges that he caused the bank to "lose" rent payments in excess of four million dollars. Mr. Johnson had no notice that he would be subject to punishment for the additional non-indicted "charges" or of the enormity of the possible restitution. This lack of notice violates due process and Mr. Johnson's constitutional rights.

The imposition of an illegal sentence is plain error. *United States v. Vance*, 868 F.2d 1167, 1169 (10th Cir. 1989). An illegal sentence includes one which "the judgment of conviction did not authorize." *United States v. Morgan*, 346 U.S. 502, 506 (1954). The Supreme Court has held that "the language and structure of the [Victims and Witnesses Protection] Act, make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. at 413. Therefore, a restitution order encompassing losses stemming from charges not resulting in a conviction is not authorized by the restitution statute and constitutes an illegal sentence. *Wainwright*, 938 F.2d at 1098 (10th Cir. 1991), citing *Hughey*, 495 U.S. at 418.

The restitution order in this case cannot be supported by statute or case law. In *Hughey*, the Supreme Court addressed the legality of a restitution order and *interpreted* the statute under which Mr. Johnson's restitution was ordered, the VWPA. It is clear that *Hughey* did not change the law. *Hughey* clarified what the VWPA meant and mandated that the letter of the law needed to be followed. Even absent *Hughey*, the restitution award in this case cannot stand given the plain, unambiguous language of the VWPA which states a victim of a federal criminal offense may recover losses incurred "as a result of the offense." 18 U.S.C. § 3664(a).

The law explained in *Hughey* governs the restitution order in this case. In the trial and appellate courts, the government argued *Hughey* could not be applied to this case retroactively because it was a change in the law.

Hughey has been applied retroactively[2] and has certainly been followed in restitution orders imposed post-*Hughey* in the Fifth Circuit[3] and other circuits.[4]

A well-researched and thoughtful opinion out of Kansas which examines the retroactive application of *Hughey*, *United States v. Savely*, 814 F.Supp. 1519 (D.Kansas 1993), *aff'd*, 827 F.Supp. 668 (1993), cites numerous cases from different circuits which apply *Hughey* to restitution orders. It also examines the standards set by this court in *Davis v. U.S.*, 417 U.S. 333 (1974) and *Teague v. Lane*, 489 U.S. 288 (1989) for determining the retroactive applicability of changes in the law.

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[2] *U.S. v. Braslawsky*, 951 F.2d 149 (7th Cir. 1991) and *U.S. v. Guardino*, 972 F.2d. 682, 687-88 n.7 (6th Cir. 1992). But see *U.S. v. Bennett*, 943 F.2d 738, 741 (7th Cir. 1991) in which the seventh circuit declined to apply *Hughey* retroactively to a plea bargain case.

[3] *U.S. v. Hayes*, 32 F.3d 171, 173 (5th Cir. 1994); *U.S. v. Jimenez*, 77 F.3d 95, 99 (5th Cir. 1996); *U.S. v. Upton*, 91 F.3d 677, 686 (5th Cir. 1996). *United States v. Campbell*, 106 F.3d 64, 70 (5th Cir. 1997). ("Hughey stands for the proposition that the loss incurred may not exceed the losses directly stemming from the conduct for which the defendant is convicted."); and *United States v. Clark*, 931 F.2d 292, 296 (5th Cir. 1991) (Defendant could only be held liable for the losses arising from the counts related to his plea and not for all losses suffered by the victim.)

[4] *Gall v. U.S.*, 21 F.3d 107, 111 (6th Cir. 1994); *U.S. v. Braslawsky*, 951 F.2d 149, 150-51 (7th Cir. 1991); *U.S. v. Baker*, 25 F.3d 1452, 1458 (9th Cir. 1994); *U.S. v. Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993); *U.S. v. Reed*, 80 F.3d 1419, 1421 (9th Cir. 1995); *U.S. v. Guthrie*, 64 F.3d 1510, 1514-16 (10th Cir. 1995); *U.S. v. Santo*, 93 F.3d 761, 763 (11th Cir. 1996); *U.S. v. Ladesma*, 60 F.3d 750, 751 (11th Cir. 1995); *U.S. v. DeSalvo*, 41 F.3d 505, 515-15 (9th Cir. 1994); *U.S. v. Elliott*, 62 F.3d 1304, 1314 (11th Cir. 1995); *U.S. v. Cobbs*, 967 F.2d 1555 (11th Cir. 1992).

The *Savely* court makes a compelling argument. Because the restitution order ordered Savely to pay restitution for losses not caused by the offense of conviction, the court concluded that " . . . Savely has been punished by the restitution order for acts which the statute does not consider criminal unless the defendant is indicted and convicted of them." *Savely*, 814 F.Supp at 1529. Applied to the instant case, Mr. Johnson is being punished, via the onerous restitution order,[5] for acts (which we can only surmise to be encouraging the bank to lease space) which are not considered criminal by the statute under which he was indicted and sentenced. Ordering Mr. Johnson to pay rents paid by United Bank for its leased space, without notice, indictment or conviction related to those rents, violates due process.

The *Savely* court also noted that, "[t]he *Hughey* decision simply declared what the VWPA meant from its enactment, and that prior interpretations of it must now be considered as having always been invalid." *Savely*, 814 F.Supp at 1529, citing *U.S. v. Shelton*, 848 F.2d 1485, 1440 (10th Cir. 1988) (en banc). Applied to Mr. Johnson, the VWPA *never* authorized the trial court to order Mr. Johnson to pay restitution for rents paid by the bank or for other amounts not caused by the offences of conviction specified in the 13 count indictment. App. 78-86. There is no reason why *Hughey* should not have been retroactively

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[5] The amount of the loss to the victim as calculated by the trial court also affected the time Mr. Johnson was ordered to serve, the fine he was ordered to pay and the amount of probation imposed. This court cannot give back to Mr. Johnson the 5 years of his life he lost in prison. Justice requires that he at least be freed of this illegal restitution order.

applied in this case, other than that such application would have invalidated the restitution order the lower courts obviously want to uphold.

The interest in finality of judgments is a valid one, but under certain circumstances, finality should not take precedence over an individual's right to challenge an illegal sentence. For example, in *U.S. v. Woods*, 986 F.2d 669 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 90 (1993), the defendant sought to overturn a restitution order which had already been paid in full and disbursed to the victims. In that case, finality was a persuasive argument and the court held the defendant would not (for a variety of reasons) suffer a miscarriage of justice by the court's refusal to apply *Hughey* retroactively. *Woods*, 986 F.2d at 681, 682.

There is no compelling reason to place finality over illegality in the instant case. Mr. Johnson has not paid all his restitution. It can be fairly said that he will never be able to pay the restitution in his lifetime, nor will his estate pay it upon his death. He will labor under that excessive order and the government's collection efforts for the rest of his life. That is the compelling reason to reexamine this restitution order nine years after conviction, even though he has served his sentence. Mr. Johnson, unlike Mr. Woods, is not asking for money to be returned to him. He is asking that he be assessed a fair restitution order, under *Hughey*, which he can potentially repay and hopefully go on with his life. He has served his time, performed his community service and is willing to attempt to pay the appropriate restitution, if possible, without the insurmountable illegal order weighing down on him.

It is important to note that nowhere in: (1) the trial court's order denying relief under 2255, App. 57; (2) the appellate court's opinion affirming that denial, App. 54; or (3) the trial court's order denying the Rule 35(a) Motion, App. 13, did either tribunal find that the amount of the restitution was correct, appropriate, authorized or legal. The government in its responses to all the motions and both courts never defended the restitution order in any way. Of course, that is because it is clearly illegal on its face.

Despite the procedural history of the collateral attack via a 2255 Motion, the appellate court, following the trial court's denial of the 35(a) Motion, should have conducted de novo review of the restitution order. *U.S. v. Reese*, 998 F.2d 1275, 1280 (5th Cir. 1993). If the Fifth Circuit had applied *Hughey* as it has done in numerous other cases before it and as other circuits have done, the court would have found the order was illegal, vacated it and remanded the matter to the trial court to enter a new restitution order. However, by grasping at procedural straws, misconstruing and misinterpreting the law contrary to their own precedent, and ignoring the mandate of this court in *Hughey*, the lower courts have committed a great miscarriage of justice which has resulted in an insurmountable burden on a citizen of this country. For some reason, the courts who have in this case been given the opportunity first to punish and later to re-examine that punishment have seen fit to single out Mr. Johnson as an individual who is not entitled to due process or the protection of the laws of this country. Mr. Johnson is asking this court, his last resort, to correct the manifest injustice apparent in the record of this case and grant this

petition so that the correct law and the correct statutory construction, handed down by this very Court, can be applied to examine the outrageous restitution order in this case. Review of this illegal order and the process which upheld it is important to all the citizens of this country. It is important for the district and appellate courts to properly and uniformly apply the law as interpreted by this Honorable Court.

Given the passage of time this Court may believe it is not important now, eight years post-*Hughey*, to set the circuits straight in the retroactive application of that decision. After all, it is likely that most defendants who wanted to complain about their pre-*Hughey* restitution orders have already done so or have already paid their restitution. This Court may also consider that there is no reason to examine this unreported opinion out of the 5th Circuit. The enormity of this illegal restitution and the refusal of the lower courts to review the order on the merits makes this case unique. Allowing this case to fall between the cracks will permit the injustice of the order in the first place and the refusal of the lower courts to consider it to stand. Mr. Johnson will be without recourse to invalidate an order which no court has yet examined and upheld on the merits. As is pointed out, the order, which was never appropriate under the VWPA, certainly cannot be upheld following this Court's pronouncement in *Hughey*.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50906
Summary Calendar

D.C. Docket No. A-88-CR-104-ALL

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RUBEN H JOHNSON

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas, Austin.

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges.

JUDGMENT

(Filed July 27, 1998 U.S. Court of Appeals)

(Filed Sept. 10, 1998 U.S. District Court,
Western District of Texas)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

ISSUED AS MANDATE: SEP 08 1998

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50906
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUBEN H. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-88-CR-104-ALL

(Filed July 27, 1998)

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges.

PER CURIAM:*

Ruben H. Johnson appeals the denial of his motion pursuant to Fed. R. Crim. P. 35 requesting a reduction in the amount of restitution he was ordered to pay as part of

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precendent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

his sentence for his bank fraud convictions. Because Johnson's motion was untimely, the district court lacked jurisdiction to afford relief. *See In re United States*, 900 F.2d 800, 803 (5th Cir. 1990).

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50906

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RUBEN H JOHNSON

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING

(Filed Aug. 28, 1998)

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

APPENDIX "D"

CASE NO: 97-50906

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN H. JOHNSON
Defendant – Appellant

V.

UNITED STATES OF AMERICA
Plaintiff – Appellee

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' PETITION FOR REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Ruben Johnson, appellant, respectfully petitions the court to grant a rehearing and reconsideration of the appeal in this cause. In support of this petition, appellant represents to the court as follows:

STATEMENT OF THE CASE

This petition seeks rehearing and reconsideration of this court's affirmance of the trial court's denial of appellant's motion to correct an illegal sentence filed pursuant to Rule 35(a), Fed. R. Crim. P. Affirmance was based on the court's conclusion that it lacks jurisdiction to grant relief because appellant's motion was not timely filed. A complete procedural history of the case is provided in appellant's brief previously filed in this case.

SUMMARY OF ARGUMENT

This court does not lack jurisdiction to consider this appeal. Appellants motion is one to correct sentence brought pursuant to Rule 35(a) Fed. R. Crim. P. The only time limitations imposed by the applicable statute are imposed by subsection (b) of Rule 35 and are inapplicable to this case.

BASIS FOR REHEARING AND AUTHORITIES

Rule 35(a) contains no time limit.

1. In holding that the court lacks jurisdiction to afford relief because appellant's Rule 35 motion was untimely, the court overlooks the distinction between subparts (a) and (b) of the applicable version of Rule 35 Fed. R. Crim. P.[1]

2. Rule 35, Fed. R. Crim. P. is divided into two very distinct subparts. Subpart (a) provides the vehicle by which an individual may move to correct an illegal sentence. Subpart (b) provides a method of requesting a reduction of a sentence. The Rule 35 version in effect for offenses committed prior to 1987 provides:

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[1] Federal Rule of Criminal Procedure 35(a) provides for the correction of illegal sentences. The Rule was completely revised in 1984, but the revised Rule applies only to offenses committed after November 1, 1987. Because appellant's offense was committed prior to 1987, Rule 35 in effect prior to the 1984 revisions applies to this case. The applicable Rule 35(a) provides that "[t]he court may correct an illegal sentence at any time."

"**Rule 35. Correction or Reduction of Sentence**

"(a) **Correction of Sentence.** The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

"(b) **Reduction of Sentence.** A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

3. Appellant specifically based his Rule 35 Motion on subpart (a) which contains no time limit. The rule clearly provides that a motion brought pursuant to subpart (a) "may be brought at any time." A motion which can be brought at any time cannot be time barred.

4. Some clarification of statements made in appellee's brief may be in order. In its brief, appellee characterizes appellant's motion as one to "reduce restitution" and states simply that the motion was brought "pursuant to Rule 35" without pointing out which subpart is actually relied on by appellant. Appellant believes the court may have been mislead [sic] by appellee's formulation of the issue in this case. Appellant's motion clearly distinguishes itself as a motion brought under Rule 35(a) and

appellant's arguments on appeal are specific to that subpart.

5. It is very important for the court to understand the distinction between Rule 35(a) and Rule 35(b). This court has jurisdiction under 35(a).

Case law supports Appellant

6. The case cited by this court in its opinion does not apply to the motion presented in this appeal. The case, *In re United States*, 900 F.2d 800 (5th Cir. 1990), denied relief to a litigant who had brought a motion pursuant to Rule 35(b).

7. The *In re United States*, opinion (on the page cited by this court) relies on the time limits in "Fed. R. Crim.App. 35**(b)**" to support its holding that the trial court lacked jurisdiction to reduce Mr. Jumper's sentence. *In re United States*, 900 F.2d 800, 803 (5th Cir. 1990). It is obvious from the opinion that *In re United States* involves *a motion to reduce sentence* and that the court bases its jurisdictional challenge to the motion on the language of *Rule 35(b)*. Rule 35(a) is nowhere mentioned in the opinion.

8. The plain language of Rule 35 states that a motion may be brought at any time. *Hill v. United States*, 368 U.S. 424, 430 (1962). *See also: United States v. Clark*, 931 F.2d 292 (5th Cir. 1991); *United Sates* [sic] *v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991) and *United States v. Lopez*, 428 F.2d 1135, 1138 (2nd Cir. 1970). In *Lopez*, the defendant filed a Rule 35 motion to complain about fines imposed by the trial court. In response, the government

argued that because *Lopez* had not raised the issue on appeal, he waived the right to raise the illegality argument. The appellate court disagreed. The court held that although it might have been better to raise the illegality of the sentence on direct appeal, *Lopez* did not waive his right to bring a Rule 35 motion because the court may correct an illegal sentence at any time. *Lopez*, 428 F.2d at 1138.

9. The cases interpreting Rule 35(a) interpret the Rule to mean what it says – that motions to correct illegal sentences may be brought at any time.

Court should consider even on its own motion

10. It is also important to point out that case law mandates that even if this Court should somehow determine that, procedurally, Mr. Johnson cannot now raise illegality in a Rule 35 Motion, this Court can and must, on its own motion, find that on the face of the record that the sentence imposed was, in and of itself, illegal. If error is plain on the record, it should be dealt with by the court of appeals. *Bartone v. United States*, 375 U.S. 52, 54 (1963) (plain error should be addressed by the appellate court even if the error was not raised on appeal.); *U.S. v. Wainwright*, 938 F.2d 1096, 1098 (imposition of an illegal sentence is plain error which should be noted even if it was not raised in the trial court, relying on Rule 52(b) Fed. R. Crim. P. which states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). Based on the above cited cases, this court has jurisdiction to consider this appeal.

CONCLUSION

In its brief on appeal, appellee argues that because appellant has served his sentence and parole, there is therefore no liberty interest at stake and this court should not entertain a motion which simply attacks the restitution order. Appellee would have this court believe that because appellant has his jail time and parole behind him, this court shouldn't bother with the restitution order.

Appellant properly requested relief pursuant to Rule 35(a) Fed. R. Crim. P. This court not only has jurisdiction, but also a duty to consider this appeal. Appellant maintains that an illegal restitution order in excess of $4,000,000.00 certainly merits the attention of this court. Mr. Johnson will *never* be out from under the erroneous order. His "liberty" is certainly affected for the rest of his life by an illegal order which should not be permitted to stand.

Wherefore appellant prays that a rehearing be granted and that on rehearing granted this court's opinion dated July 27, 1998, be withdrawn and the court enter a new opinion.

CERTIFICATE

As counsel for the appellant, I hereby certify that the foregoing petition for rehearing is not frivolous and is presented in good faith and not for delay.

Respectfully submitted,

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By: _____
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Linda J. Stanley

ATTORNEYS FOR APPELLANT, RUBEN H. JOHNSON

CERTIFICATE OF SERVICE

I, Linda J. Stanley, certify that today, August 14, 1998, two (2) copies of the Motion for Rehearing was delivered upon the following by Federal Express No. 805947439471 for delivery before 10:00 a.m. on August 17, 1998:

James William Blagg, United States Attorney
Richard L. Durbin, Jr., Assistant United States Attorney
Mark R. Stelmach, Assistant United States Attorney
UNITED STATES ATTORNEY, WESTERN DISTRICT OF TEXAS
601 NW Loop 410, Suite 600
San Antonio, Texas 78216

/s/ _____
Linda J. Stanley

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
VS.	§	A-88-CR-104 JN
RUBEN H. JOHNSON	§	

ORDER

(Filed Oct. 3, 1997)

Before the Court is Defendant's Motion to Correct Sentence filed on September 2, 1997. The Government filed its Response to Defendant's Motion to Correct Sentence and Motion to Require Defendant Johnson to Disclose and Account for Monies Expended in This Post-Conviction Litigation on October 2nd. Upon review of the Motion, the Response and the entire case file, the Court finds that Defendant Johnson's Motion should be denied.

Defendant was sentenced in 1989 upon his conviction of 13 counts of misapplication of bank funds. In addition to a term of imprisonment and a fine, Defendant was ordered to pay $4,566,298 in restitution. Defendant has completed his term of imprisonment and his parole and is currently on probation and making payments on his restitution.

Defendant directly appealed his conviction and sentence but later withdrew the appeal. In January 1992,

Defendant filed a motion to vacate, set aside or correct sentence pursuant to 28 U. S.C. § 2255. Defendant argued that the restitution order failed to comply with *Hughey v. United States*, 495 U.S. 411 (1990), and that the order was subject to a substantial reduction. This Court accepted the Magistrate Judge's Report and Recommendation and denied the section 2255 motion on June 30, 1992.

The Fifth Circuit Court of Appeals affirmed the Court's decision. The Fifth Circuit, it its unpublished opinion, stated that:

> Johnson did not directly appeal the amount of restitution ordered by the district court even though he concedes that he raised objection to the alleged losses in district court. *Hughey*, a statutory construction case, does not raise a constitutional issue. *See* 495 U.S. at 419. Although *Hughey*, decided after Johnson was sentenced, could not have been raised on direct appeal, the appropriateness of the amount of restitution could have been, but was not, raised on direct appeal. Instead, Johnson **affirmatively** moved to withdraw his appeal. His failure to appeal waived the factual issue as to the appropriateness of the amount of restitution.

United States v. Ruben Johnson, 1 F.3d 1237 (5th Cir. 1993) (Unp. Op. No. 92-8374, May 6, 1993) (emphasis in original). The motion now before the Court, brought more than eight years after sentencing, requests that the Court correct the restitution order under Federal Rule of Criminal Procedure 35(a).[1]

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[1] Federal Rule of Criminal Procedure 35(a) provides for the correction of illegal sentences. The Rule was completely revised

As noted by the Government, Defendant's motion raises essentially the same attack of the restitution order as the Defendant's March 22, 1992 section 2255 motion. In fact, the substance of the Rule 35(a) motion is identical to the substance of the Defendant's previous section 2255 motion. Defendant again relies on the *Hughey* case for the proposition that the restitution amount was not related to or caused by his crimes of conviction. This issue was fully and finally resolved by this Court's adjudication of the section 2255 motion and by the Fifth Circuit's May 1993 mandate affirming this Court's decision. As concluded by the Fifth Circuit, Defendant Johnson waived his ability to attack the restitution order by abandoning his direct appeal of the issue.

Accordingly, the Court finds that Defendant's motion should be denied. In fact, Defendant's most recent attempt to reduce the amount of restitution imposed by this Court over eight years ago is completely without merit – and the Defendant's expenses in attorneys' fees related to this motion could have been better used to reduce the outstanding balance of the restitution order. The Court will grant the Government's Motion to Require Defendant Johnson to Disclose and Account for Monies Expended in This Post-Conviction Litigation. Defendant will provide his parole officer with an accounting of the

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in 1984, but the revised Rule applies only to offenses committed after November 1, 1987. Because Defendant's offense was committed prior to 1987, Defendant argues that the old Rule 35(a) applies to this case. The old Rule 35(a) provides that "[t]he court may correct an illegal sentence at any time."

source and amount of monies used to finance this most recent post-conviction litigation.

IT IS THEREFORE ORDERED that Defendant's Motion to Correct Sentence is hereby DENIED.

IT IS FURTHER ORDERED that the Government's Motion to Require Defendant Johnson to Disclose and Account for Monies Expended in This Post-Conviction Litigation is hereby GRANTED and that Defendant Johnson file with the United States Probation Office at Austin, Texas, a sworn affidavit in which the Defendant accounts for all legal expenditures, retainer fees, deposits, or other monies related to the September 2, 1997 filing of the Defendant's Motion to Correct Sentence; and that Defendant comply with this Order on or before October 28, 1997.

SIGNED AND ENTERED this 3d day of October, 1997.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

APPENDIX "F"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
	§	A-88-CR-104
vs.	§	
	§	
RUBEN H. JOHNSON	§	

DEFENDANT'S MOTION TO CORRECT SENTENCE

(Filed Sept. 2, 1997)

TO THE HONORABLE COURT:

NOW COMES RUBEN JOHNSON, by and through his attorneys and makes this Motion to Correct Sentence pursuant to Rule 35(a), Federal Rules of Criminal Procedure, and will show:

I.

Jurisdiction.

This court has jurisdiction pursuant to Rule 35(a), Fed. R. Crim. P. A District Court may correct an illegal sentence at any time. *US. v. Simpson* 885 F2d 36, 37 (3rd Cir. 1989).

II.

Brief Statement of the Case

Movant was sentenced on July 20, 1989 for offenses alleged to have been committed in 1983 and 1984. Movant was found guilty on thirteen counts, received an eight-

year term of imprisonment, a five-year period of probation and a $65,000.00 fine. He was ordered to pay the sum of $4,566,298.00 in restitution pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580 (recodified at 18 U.S.C. 3663, 3664) ("VWPA") and ordered to perform 500 hours of community service. Movant was in custody from August 21, 1989 to July 1, 1994. He completed his parole and his community service and is currently on probation, living and working in Austin, Texas. He has paid all monthly payments on his restitution, as required by his probation officer.

For a complete procedural chronology, see Appendix 1, "Chronology of the Case."

III.

Basis for Motion.

The restitution order is not authorized and is therefore illegal and a violation of due process. The restitution order is illegal for two reasons:

> 1. The restitution order includes amounts not related to the offenses of conviction;
>
> and
>
> 2. The restitution order includes amounts which, although related to the convictions, were not losses caused by the acts specified in the indictment or conviction.

The basis of this motion has not been considered by this court or the appellate court on the merits in any prior proceeding in this case. Mr. Johnson previously filed a motion under Rule 35(b) which did not address this issue.

A Rule 2255 Motion to Vacate, Set Aside or Correct Sentence was filed and denied both in the trial court and on appeal to the 5th Circuit. The Rule 2255 Motion did assert that the restitution was excessive, but the courts never ruled on the merits of that argument. The trial court and the appellate court denied the motion and appeal on the grounds that the defendant had waived his right to complain about the restitution under Rule 2255 because defendant did not file a direct appeal.

IV.

Discussion and Brief

1. Applicability of Rule 35.

Movant brings this motion pursuant to Rule 35(a), Fed. R. Crim. P. Rule 35(a) was rewritten in 1985.[1] However, the revised rule was not effective until November 1, 1987 and is inapplicable to offenses committed before that date. Because movant's offences were committed prior to November 1, 1987, the rule in effect at the time of the offense(s) applies. *Simpson* 885 F2d 36, 38 (3rd Cir. 1989); *United States v. Blackmer*, 909 F2d 66 (2nd Cir. 1990).

The version of Rule 35(a) in effect at the time of defendant's convictions provided:

> **Rule 35. Correction or Reduction of Sentence.**
>
> (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal

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[1] Rule 35 has been revised since 1987, but those revisions do not impact this case.

> manner within the time provided herein for the reduction of sentence.

Rule 35, Fed. Rules Crim. P.

Rule 35(a) allows the court to correct an illegal sentence at anytime. *United States v. Wainwright* 938 F2d. 1096, 1098 (10th Cir. 1991). The imposition of an illegal sentence is plain error. *United States v. Vance* 868 F2d 1167, 1169 (10th Cir. 1989). "Plain error or defects affecting substantial rights may be noticed at any stage even though they were not brought to the attention of the trial court." *Wainwright* 938 F2d. 1096, 1098 citing Rule 52(a), Fed. R. Civ. P., 18 U. S.C.

An illegal sentence includes one which "the judgment of conviction did not authorize." *United States v. Morgan,* 346 U.S. 502, 506 (1954). The Supreme Court has held that "the language and structure of the [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States* 495 U.S. 411, 412-13 (1990). Therefore, a restitution order encompassing losses stemming from charges not resulting in convictions is not authorized by the restitution statute and constitutes an illegal sentence. *Wainwright* 938 F2d. at 1098 (10th Cir. 1991), citing *Hughey* 495 U.S. 411, 418. It follows, therefore, that Rule 35(a) may be used to correct an unauthorized restitution order. *Hughey* 495 U.S. 411; *Wainwright* 938 F2d. at 1098.

It is well recognized that a Rule 35(a) motion is addressed to the sound discretion of the district court. *United States v. Lauga,* 762 F2d 1288, 1291 (5th Cir. 1985); *United States v. Jones,* 444 F.2d 89, 90 (2d Cir. 1971);

Government of Virgin Islands v. Gereau, 603 F.2d 438, 443 (3rd Cir. 1979); *United States v. Jones*, 490 F. 2d 207, 208 (6th Cir.) cert. denied, 416 U.S. 989 (1974); *United States v. Kadota*, 757 F.2d 198, 199 (8th Cir. 1985); *United States v. Eastman*, 758 F.2d 1315, 1317 (9th Cir. 1985 *United States v. Galoob*, 573 F.2d 1167, 1170 (10th Cir. 1978). The power to reduce or alter the sentence "is an inherent power of the court and is one aspect of the control which a court retains over a judgment which it has entered." *United States v. Ellenbogen*, 390 F.2d 537, 540 (2d Cir.), cert. denied, 393 U.S. 918 (1968); *United States v. Benz*, 282 U.S, 304, 306-307 (1931). This court has the power to reduce or vacate the restitution order complained of in this case.

2. Factual Background.

At the time of the offenses described in the indictment Ruben Johnson was Chairman of the Board of the United Bank of Texas (formerly University State Bank) in Austin, Texas, and was a shareholder in the holding company which owned the bank. He was also the general partner of and held a limited partnership interest in Fifteenth Street Building Limited ("15th Street Ltd."), which owned the building where the bank was housed from May 1981 until the bank was closed by the FDIC in 1987. The bank relocated to the 15th Street Ltd. building in May 1981.

Essentially, Ruben Johnson was indicted for and convicted of misappropriating funds[2] between September 20,

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[2] Throughout this proceeding, the government has referred to certain payments made by George Zapalac to Mr.

1983 through September 10, 1984. A contractor, George Zapalac ("Zapalac") was hired by the bank to complete the tenant finish out for space which the bank leased (including space the bank occupied and space the bank sublet to others). Zapalac performed his work and presented invoices to the bank for payment. Those invoices included a fifteen percent developer's fee for Mr. Johnson. The bank paid Zapalac the amounts he billed by issuing expense vouchers and writing him a check or depositing money into his account. Zapalac, acting through his staff, then paid Mr. Johnson 15% of the amounts paid to him by the bank. Mr. Johnson did not defend on the basis that he did not receive the money; his defense was that those payments were developer's fees.

The counts in the indictment were limited to 13 specific instances of misapplication of bank funds in an amount over $100.00 through the issuance of 13 different United Bank expenses vouchers, in different amounts and on different dates (See Indictment, Exhibit A). The amounts of the 13 vouchers listed in the 13 counts totaled $731,609.46. Each specific expense voucher was dated on a specific date during the period from Sept. 20, 1983 through Sept. 10, 1984. The government's evidence and arguments to the jury established that Mr. Johnson received only 15% of the amount of expense vouchers.

Johnson as "kickbacks." Mr. Johnson maintained those sums were developers fees. For ease, those payments will be referred to simply as "fees" in this Motion. The use of the term "kickback" should not be construed as any admission on Mr. Johnson's part.

The Court, however, ordered Mr. Johnson to pay restitution of $4,566,298.00. That included $394,298.00 for all fees ever received by Mr. Johnson which the FDIC could document (as opposed to only the fees related to the indictments) and $4,172,000.00 for losses the bank supposedly suffered because of additional space leased by the bank.

Between 1979 and January 1982, United Bank leased additional space in the building for expansion. Mr. Johnson was the Chairman of the Board of Directors at that time. The State Banking Department and bank board approval was obtained to lease the additional space. The bank sublet some of the additional space to others. The government argued that Mr. Johnson caused the bank to lease additional space which was not originally contemplated when the bank sought approval for the FDIC to move the bank to the new building. The government, therefore, termed the amount paid by the bank to lease that additional space "losses" related to the lease(s). It is those phantom losses from leases which made up the bulk of the restitution order ($4.172 million). Mr. Johnson was not indicted for any act related to these leases, and was certainly not convicted for any such acts.

The loss suffered by the victim, the FDIC as successor to the bank, was the total amount of fees paid to Mr. Johnson "through issuance of' the 13 specific payment vouchers referenced in the indictment and introduced into evidence at trial. Only $109,741.41 of the total restitution ordered represented the bank's losses from the 15% fees paid on those vouchers. This amount ($109,741.41) was the only loss related to Mr. Johnson's conviction and

is the only amount he should be ordered to pay as restitution. The remainder of the restitution, $4,456,556.60 is illegal.

A. The restitution ordered includes amounts not related to the offenses of conviction.

1. Losses from Lease Payments Are Unrelated to the Kickbacks.

The "losses" the bank allegedly incurred for leasing of additional space are wholly unrelated to the acts for which Mr. Johnson was indicted and convicted.

The record clearly shows that the crime Mr. Johnson was charged with involved his receipt of fees. Nowhere does the record show he was charged with any crime related to space leased by the bank. Various portions of the record should be examined.

a) The Hearing on Pretrial Motions.

In the hearing on the pretrial motions, the prosecutor, Mr. Blankinship explained the charges against Mr. Johnson. He said, "Your Honor, each count alleges the funding of a separate expense voucher by United Bank . . . . I can summarize the manner and means of the kickbacks right here in about a matter of forty-five seconds." Mr. Blankinship went on to describe the method of the payment of the fees by Zapalac to Johnson and concluded, "That's the scheme."[3] The "scheme" he planned to establish was that Mr. Johnson took 15% kickbacks on each of the vouchers

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[3] Transcript Exhibit E, pg. 13-15.

listed in the 13 counts in the indictments. The losses from the leases weren't mentioned in the entire hearing.

b) The Court's Instructions on Voir Dire.

The trial court, in its instruction to the panel during voir dire, made it clear that an indictment lets the person charged know of the charges pending against him and makes him aware of the extent of those charges so that he may adequately and appropriately defend against those charges.[4] The indictment in this case gave Mr. Johnson notice that he needed to defend the charges of misapplication of bank funds related to 13 separate payment vouchers. It gave him no notice that he was charged with any criminal act related to leases, or that he would be ordered to pay restitution for the money the bank lost on those leases. It also gave him no notice he'd be required to pay losses on other fees he received which were not related to the 13 vouchers in the indictment.

The record is replete with reference to extraneous matters not related to the indictment.[5] When Mr. Johnson's counsel pointed out his concern about the admission of such extraneous matters at the Motion in Limine hearing, the court responded: "Well, I can tell you in generalities that if any element is not relevant to the charge or charges in this indictment, my view is that it's not admissible. If it's some extraneous affair, event, transaction *that has nothing to do with the proof related to the*

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[4] Transcript Exhibit F, pg. 15, ln. 8 and pg. 100, ln. 5

[5] Transcript Exhibit F, pg. 117, ln. 25 – pg. 118, ln. 10.

charges in this indictment, I don't think it's relevant." (emphasis added)[6] As it turned out, however, much was admitted under the guise of it being evidence of intent and motive under Fed. R. Evidence 404(b). But throughout this court was very careful to only allow the extraneous evidence in for this limited purpose.

c) The Trial.

The first mention in the testimony about the lease of an additional 62,351 square feet in the 15th street bank building was in Mr. Blankinship's redirect examination of Robert Fry, the bank president during the relevant time periods.[7] (See Exhibit G, pg. 157, ln. 22.) Mr. Fry testified the expansion space was leased because the board decided the bank needed additional space.[8] He also testified Mr. Johnson recommended the lease.[9] The evidence was the space was leased for expansion, and that the board approved it (rather than that Mr. Johnson caused the bank to lease it) but the prosecutor suggested that Mr. Johnson got the bank to lease the space because 15th Street Ltd. had to have a certain amount of occupancy that would generate a certain amount of revenue by Jan. 1982, or they weren't going to get their next tier of permanent financing, that is, $950,000 worth of permanent financing. Mr. Fry did not confirm this.[10]

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[6] Transcript Exhibit F, pg. 118, ln. 11.

[7] Transcript Exhibit G, pg. 157, ln. 22.

[8] Transcript Exhibit G, pg. 158, ln. 11-19.

[9] Transcript Exhibit G, p. 158.

[10] Transcript Exhibit G, pg. 159, ln. 17-25.

Mr. Blankinship tried again to convey this idea through Dorothy Shelton, who worked for 15th Street Ltd. at the time the additional space was leased. She recalled talking to Mr. Johnson in January 1982, about the permanent financing for the partnership – that the interim financing expired on January 31, 1982 and that certain qualifications had to be met to close the tiered funding. Ms. Shelton testified that immediately before January 1, 1982, 15th Street Ltd. didn't have enough occupancy to generate the income needed for the permanent financing. She also testified that Mr. Johnson said the bank was going to lease additional space, and that with parking revenues turned out to be enough to get the permanent financing.[11]

With all the above testimony, Mr. Blankinship's inference to the jury was that Mr. Johnson caused the bank to lease the extra space so the 15th Street Ltd. could get the permanent financing it needed. This evidence came in ostensibly to show intent to deceive – but there is no connection between these acts and the fees paid to Mr. Johnson. Mr. Blankinship tried to tie them together by saying that these alleged, extraneous bad acts show motive – the need for money. He argued that is what motivated Mr. Johnson to (1) cause the bank to lease extra space and (2) to take the fees from Zapalac. But even if the motive was the same, that doesn't make the act of leasing additional space part of the crime for which Mr. Johnson was charged, tried and convicted.

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[11] Transcript Exhibit G, pg. 182-186.

Since the indictments were only for fees from a select group of payment vouchers, the only possible way the leases, and therefore the "losses" from the leases, could have been related to the indictments was if the government claimed Mr. Johnson caused the bank to lease the additional space so that he could receive fees on the finish out of that additional space. The government would have had to show that he would not have received the fees if the bank hadn't leased the space. But that is contrary to the evidence. The evidence was that Mr. Johnson received the 15% fee on the finish out of all the space in the entire building, whether it was leased by the bank or some other tenant. Becky Garner, the bookkeeper for Mr. Zapalac testified that the rule was that 15% was added for Mr. Johnson's fee on all the tenant finish out on all the space in the building, even for tenants other than the bank.[12]

(d) The Pre-Sentence Report.

In the presentence report (Exhibit D), the government describes what it considered the "scheme" of defendant – misapplication of funds on tenant finish out. The report doesn't reference the leases in that scheme. There is, however, a separate section in the presentence report, item 4. "Evidence of Wanton Disregard of Bank's Interest" wherein the government accused the defendant of being responsible for all the costs of all the space which the bank leased over and above what the FDIC approved

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[12] Transcript Exhibit G, pg. 76-77.

in the original application to move the bank to the building on 15th Street.[13] (The government gave credit for monies received from subletting some of the additional space.) However, this conduct related to the leases was not in the indictment and was not proven. The amount the bank paid on its leases is unrelated to the losses caused by the acceptance of fees from Zapalac.

In the "Victim Impact Statement" contained in the presentence report, information from Steve Hake, an attorney representing the FDIC in a civil case, was used to summarize the losses to the bank "caused by defendant." Mr. Hake claimed there was $4.172 million in charges to the bank resulting from the lease of space not needed or wanted by the bank.[14] Although Mr. Hake stated he "gave credit" for the amounts recovered from subtenants, there is no explanation or breakdown provided for this $4.172 million. There was certainly no proof offered in the criminal trial of these alleged losses from lease payments. This loss may have been the subject of some theory of liability in the civil case (which is unknown) but it cannot be connected to the losses due to defendant's conduct as charged in the indictments.

It is interesting to note that in the Preesentence Report, the government did not even try to say that the leases were part of Mr. Johnson's alleged scheme. This lease information appears only in the paragraph about wanton disregard. This is not an element of any criminal

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[13] Exhibit D, pg. 8-9.

[14] Exhibit D, pg. 11.

charge against Mr. Johnson. Mr. Blankinship, when arguing about the amount of restitution requested at the sentencing hearing, said:

> With regard to the extra lease space, that is, the 4.712 million dollars, there was a great deal of time during the trial dedicated to demonstrating to the jury that Mr. Johnson caused the bank to lease this excessive amount of space at great cost to the bank. *That was part of his fraud.* That was part of the evidence. And that ought to be part of the restitution. (emphasis added)[15]

There simply is no connection between Mr. Johnson's actions related to the fees and the bank's payments on the leases for additional space. There was no evidence that Mr. Johnson caused any losses related to the leases. The bank's action in leasing additional space, the subleases themselves and Mr. Johnson's involvement in leasing the tenant space, if any, are not referred to in the indictment, jury charge, or judgment of conviction. The only conclusion from a review of the record is that the losses from the leases were not part of the offense of conviction.

2. **Losses from the lease (and thus the restitution ordered for those losses) did not occur "during the commission of the offense."**

The Judgment and Probation/Commitment Order ("Judgment") (attached as Exhibit "B") provides, in part:

> Defendant has been convicted as charged of the offense(s) *of on or about September 20, 1983 and continuing through on or about September 10, 1984,*

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[15] Transcript Exhibit H, pg. 227 & 228.

> the defendant knowingly and with intent to defraud did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the monies, funds and credits belonging to United Bank of Texas of which were insured by the Federal Deposit Insurance Corporation, in violation of Title 18 U.S.C. 656 as charged in Counts I through 13 of the indictment. (Emphasis added)

The Judgment goes on to hold that defendant is to pay restitution "to compensate FDIC for losses incurred during the commission of the offense."

The only logical construction of the above is that Mr. Johnson was to pay for losses which occurred as a result of his conduct (as alleged in Counts 1 through 13 of the indictment) from September 20, 1983 through September 12, 1984.

The presentence report lists the leases the government is complaining about.[16] These leases of additional space occurred 12/31/79, 3/1/81, 10/31/81, and 1/1/82. The leases did not occur in 1983 or 1984.

Therefore, the "losses" from the leases alleged in Exhibit D, pg. 11, did not occur from conduct between September 20, 1983 and September 12, 1984 and could not be part of any restitution "for losses incurred during the commission of the offense."

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[16] Exhibit D, pg. 9.

Also, the Victim Impact Statement does not indicate when the alleged losses occurred.[17] The "losses" (whatever they are) could have accrued anytime between 1979 and 1987 because the leases started in 1979, 1981 and January 1982 but continued until the bank closed in 1987.[18]

The Judgment, by its own terms, limits the losses to a specific time frame.[19] Even if the "losses" which the government asserts resulted from the leases could somehow be connected to the conduct Mr. Johnson was indicted for and convicted of (which is emphatically denied), the losses are not established to fall within that time frame.[20] The restitution related to the losses on the leases thus constitutes a sentence which the judgement of conviction did not authorize, constitutes plain error and must be invalidated. *Wainwright* 938 F2d at 1098 relying [sic] *Hughey v. United States* 495 U.S. 411 (1990).

B. The restitution ordered includes losses allegedly caused by similar conduct, but not caused by the acts specified in the indictment or conviction (all fees paid to Johnson by Zapalac).

The restitution ordered in this case included all alleged losses to the bank resulting from the 15% developer's fees received by Mr. Johnson for all the work

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[17] Exhibit D, pg. 11-12.

[18] Exhibit D, pg. 9.

[19] Exhibit B.

[20] Exhibit D, pg. 11.

Zapalac ever performed for the bank, not just the fees related to the thirteen vouchers listed on the indictment. Therefore, the restitution order includes losses allegedly caused by similar conduct – payment of fees – for which Johnson was not indicted or convicted. That portion of the restitution order, therefore, involves fee payments which occurred prior to and after the specific dates in the 13 different counts in the indictment. Any amount of the restitution ordered for alleged losses which did not occur *during the commission of the offense* in the indictments, is illegal.

1. Losses Johnson was ordered to pay via restitution are unrelated to the specific acts charged in the indictment.

The evidence showed that Zapalac performed all the tenant finish out for the bank.[21] He successfully bid against Charles Morton. Zapalac testified that Mr. Johnson requested that he and Morton include a fifteen percent fee for him, in their bids to the bank.[22] The evidence extracted from Zapalac's testimony and from the testimony of his bookkeeper, Becky Garner, showed Mr. Johnson received a 15% fee on all the tenant finish out Zapalac performed for the bank and for the other tenants in the building.[23] Therefore, the 15% fee was taken from more expense vouchers than those listed in the indictment.

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[21] Transcript Exhibit F, pg. 253.

[22] Transcript Exhibit F, pg. 256.

[23] Transcript Exhibit F, pg. 270, ln. 17 and Transcript Exhibit G, pg. 76.

However, in setting the restitution in this case, the Court may only look to the 15% taken on the specific vouchers listed in the indictment.

The government, in the Presentence Report, suggested that there was a "scheme" for misapplication of funds which was executed between 1978 and late 1984.[24] But no scheme was alleged in the indictment, and a scheme is not an element of the crimes charged. In fact, a scheme was not even argued to the jury. The only reference of "scheme" found in the transcript was in the hearing on the pretrial motions as discussed in Section A. 1. a) above wherein Blankinship referred to the 13 counts of the indictment. Even if there had been a scheme determined, it would have been limited to the time frame and vouchers listed in the indictments.

Essentially, the jury was asked if Johnson committed the offense in each of the 13 counts of the indictment. This court instructed, "The defendant is not on trial for any act or conduct or offense not alleged in the indictment."[25] Johnson was found guilty on only those 13 counts, not the similar acts which went into evidence in the trial (about other alleged fees he received).[26] Johnson was not convicted of misapplying any bank money other than that received through the expense vouchers listed in the 13 counts. All the evidence of other fees he received was allowed into evidence under Federal Rule of Evidence 404(b) – other similar acts.

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[24] Presentence Exhibit D, pg. 1.

[25] Transcript Exhibit H, pg. 157.

[26] Transcript Exhibit H, pg. 217.

This Court, in its instructions to the jury, even addressed "similar acts" and instructed:

> "During this trial, you may have heard evidence of acts of the defendant which may be. . . . similar to those charged in the indictment but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other very limited purposes. If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment. These are the limited purposes for which any evidence of other similar acts may be considered."[27]

In the presentence report, the government asserted that the thirteen counts in the indictment represented only a fraction of the total number of United Bank vouchers through which Johnson misapplied funds.[28] The government referred to interrogatory answers of Johnson in a civil case where he swore that he received $471,562 in "development fees" from George Zapalac because of Zapalac's work on the United Bank leasehold. Id.

The 15% fee from the vouchers listed on the 13 indictments totals only $109,741.41. The sentencing transcript,

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[27] Transcript Exhibit H, pg. 156.

[28] Transcript Exhibit D, pg. 8.

however, clearly shows that the government asked for and received a restitution order which included the amount of $394,298.00 of alleged fees Johnson received.[29] The government's explanation as to why they were not asking for the $471,562 described in the presentence report was that they were only able to document $394,298.00.[30] But the point is – this amount is more than 15% of the vouchers in the indictment. It is all the money that the government said it could establish that Johnson received as fees on all the work done by Zapalac for United Bank, including all the similar acts which this Court said the jury could not consider. This amount of $394,298.00 was not limited to the losses caused by the conduct alleged in the indictments.[31]

Johnson objects to the restitution order in so far as it includes fees in excess of the amounts proven to have been paid via the 13 payment vouchers specified in the indictment ($109,741.41).

2. Losses from other acts did not occur "during the commission of the offense."

The indictments listed offenses which occurred between Sept. 20, 1983 and Sept. 10, 1984.[32] The $394,298.00 ordered to be paid as restitution clearly included fees allegedly pay [sic] by United Bank expenses

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[29] Transcript Exhibit H, pg. 226.

[30] Transcript Exhibit H, pg. 227.

[31] Indictment, Exhibit B.

[32] Indictment, Exhibit B.

vouchers which were issued at times other than "during the commission of the offense."

Based upon the evidence, the fees received by Mr. Johnson on the bank's space finish-out started much earlier than the time frames in the indictments. For instance, the contract which Zapalac had with the bank was for $1.332 million to finish out the first three floors of the bank building (the space the bank was to occupy). Zapalac further testified that he included a 15% fee for Johnson in that bid. That work was performed in 1980.[33] Any alleged losses to the bank from those fees did not occur during the commission of the offense. They occurred from similar acts which were not admitted to show guilt, but were admitted to show intent.

Though it was argued in the presentence report that there was a scheme which lasted from 1978 through 1984, Johnson was not found guilty of a scheme. He was found guilty only on the 13 specific counts of the indictment.[34]

This Court instructed the jury regarding the dates of the offense:

> "You'll note that the indictment charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged."[35]

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[33] Transcript Exhibit F, pg. 253-255.

[34] Transcript Exhibit D, pg. 1.

[35] Transcript Exhibit H, pg. 156.

The dates of the similar acts were not "reasonably near" the dates in the indictment. The dates of "losses" to the bank included in the restitution amount included payments made from 1978 through 1984.[36] That is impermissible. The restitution ordered should be limited to the dates of the occurrence of the offense as specified in the indictment (to $109,741.41).

3. Application of case law.

The restitution ordered cannot be supported by statute or case law. In *Hughey v. United States*, 495 U.S. 411 (1990), United States Supreme Court addressed this very issue and interpreted the statute under which Mr. Johnson's restitution was ordered.

Defendant, Hughey, was indicted for three counts of theft by a U.S. Postal Service employee and three counts of unauthorized use of a credit card. In exchange for the government's agreement to drop other charges, Hughey pleaded guilty to one count of theft related to the use of one unauthorized MBank credit card. During the plea proceeding, the government alleged Hughey had stolen other credit cards and submitted a request for restitution in the amount of $90,431.00 which represented MBank's losses from defendant's use of 21 stolen MBank credit cards. Petitioner argued his restitution should be limited to the amount of the losses MBank suffered as a result of defendant's use of the one card related to the one count in his plea. Those losses totaled only $10,412.00. The trial

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[36] Presentence Exhibit D.

court ordered restitution of $90,431.00. Hughey filed a Rule 35 Motion which was denied. The 5th Circuit affirmed holding the restitution was justified because "there was a significant connection between the crime of conviction and similar actions justifying restitution". *Hughey v. United States*, 877 F.2d 1256, 1264 (5th Cir. 1989). The Supreme Court reversed the appellate court, held the restitution order was invalid and remanded the case to the trial court to recalculate the restitution.

The Court's rationale was very simple. Hughey was convicted of using one credit card issued to a Mr. Hershey Godfrey. The trial court, however, ordered restitution which included all losses incurred by MBank as a result of Hughey's use of additional stolen cards. The Supreme Court held, "Because the restitution order encompassed losses stemming from alleged fraudulent uses of cards issued to persons other than Godfrey, such portions of the order are invalid." *United States v. Hughey*, 495 U.S. at 422. It is also interesting to note that Hughey's use of the credit cards was couched as "a scheme" in the indictment, but the government didn't rely on that in this appeal.

The *Hughey* facts are analogous to those in the instant case. Hughey's actions (theft and unauthorized use of credit cards) were the same for the Godrey card (which he was convicted of) as for the twenty other MBank credit cards (which he was not convicted of) and MBank incurred the same type of loss as a result of those actions – amounts of money charged on stolen credit cards. Some of those losses were a direct result of the use of the Godfrey card; the rest were not. In the instant case it can be argued Johnson actions (receiving fees through bank

expense vouchers for tenant finish-out) were the same for the 13 specific expense vouchers referenced in the indictment as for the expense vouchers not referenced in the indictment. Again, the losses the victim (FDIC as successor to the bank) suffered were the same type of losses – 15% of each voucher. The trial courts in both *Hughey* and the instant case did the same thing – ordered the defendant to pay restitution for all the losses related to the defendant's actions. In *Hughey* the losses related to all his credit care [sic] use; in the instant case the losses related to the acceptance of all fees from Zapalac. Hughey's restitution order was challenged and was struck down. Mr. Johnson's order should suffer a similar fate.

As the *Hughey* court points out, the language the VWPA clearly refers to losses caused by the "offense" charged. *Hughey*, 495 U.S. at 418. The Court held, "[I]f Congress had intended to permit a victim to recover for losses stemming from all conduct attributable to the defendant, including conduct unrelated to the offense of conviction, Congress would likely have chosen language other than "the offense" which refers without question to the offense of conviction." *Id.*

The Supreme Court granted certiorari in *Hughey* to resolve the split of authority on this issue in various courts of appeals. *Hughey* did not make new law, it merely clarified what the VWPA meant and mandated that the letter of the law needed to be followed. The words of the statute cannot be ignored. "[T]he language and structure of the Act make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of

conviction. *Hughey,* 495 U.S. at 413. Even absent *Hughey,* the restitution award in this case cannot stand given the plain, unambiguous language of the VWPA which states a victim of a federal criminal offense may recover losses incurred "as a result of the offense." 18 U.S.C. § 3664(a). See: *United States v. Holley,* 23 F3d 902, 914 (5th Cir.1994).

Even if the language of the VWPA was ambiguous, the *Hughey* court stated that, "long standing principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey,* 495 U.S. at 422 citing, *Simpson v. United States,* 435 U.S. 6, 14-15 (1978).

The Fifth Circuit Court of Appeals follows the Supreme Court's mandate. In *United States v. Campbell,* 106 F3d 64 (5th Cir.1997) an illegal restitution order was struck down. Campbell was convicted on three counts of bank fraud, conspiracy to commit bank fraud and making false entry in bank records. The defendant had purchased land in Colorado which he later transferred to a corporation he had formed with his father. In 1986, Campbell had financial trouble and sought to obtain a personal loan pledging the land as collateral. Flower Mound Bank ("FMB") agreed to loan defendant $90,000.00 ("the loan") if he would pledge the property as collateral for the new loan and for several outstanding unsecured loans defendant had at the bank. Campbell eventually defaulted on the loans, filed for bankruptcy and sold the Colorado property. The proceeds from that sale were used to pay off the $90,000.00 debt to Security Bank of Flower Mound which acquired FMS's assets when it became insolvent ("the bank"). The amount paid to the bank actually

exceeded the amount of the loan; the bank received $123,917.82.

Campbell was sentenced to probation and was ordered to pay restitution of $540,229.56. He appealed the conviction. The appellate court reversed the convictions on two of the three counts and on remand the restitution was reduced to $211,082.18. Campbell again appealed. The appellate court, holding, "We need go no further than *Hughey* . . . " found the bank had actually been overcompensated by the payment to it of $123,917.82 and therefore there were no losses caused by the offense of conviction for which restitution could be ordered. *Campbell,* 106 F.2d at 69.

In *Campbell,* the government argued that because the defendant had agreed to secure eleven prior loans with the Colorado property, the losses due to defendant's false entry included the value of those loans as well. Those loans, however, were not the subject of the convictions. The court, therefore, disagreed with the government's position stating, "Hughey stands for the proposition that the loss incurred may not exceed the losses directly stemming from the conduct for which the defendant is convicted." *Campbell,* 106 F.2d at 70.

In *United States v. Wainwright,* 938 F2d 1096 (10th Cir.1991) Wainwright and co-defendant, Margaret Moore, were charged, in a seven-count indictment, with devising and intending to devise a scheme to obtain money from six different banks. The defendants forged and cashed stolen checks. Wainwright pleaded guilty to one count (#7) which alleged he and his co-defendant defrauded Mid-American Bank of $700.00 by the use of one stolen

check. Based on the plea, the court sentenced Wainwright to 5 years in prison and ordered him to pay $4,963.00 in restitution which represented 50% of the *total* amount of losses suffered by all six of the banks identified in the indictment.

Wainwright argued the restitution was improper and therefore the sentence was illegal. The appellate court agreed. Relying on *Hughey*, the court held that because Wainwright pleaded guilty to only the charge related to Mid-American Bank (count 7), the restitution not related to that count was an illegal sentence, constituted plain error and must be vacated. The court limited Wainwright's restitution to 50 percent of the amount defrauded from Mid-American – $350.00. *Wainwright*, 938 F2d at 1098. *See also: United States v. Cockerham*, 919 F2d 286 (5th Cir.1990) (A bank president convicted for participation in scheme to secretly share in benefits of real estate development loans following a guilty plea to four of eighteen counts. Restitution held inappropriate because defendant was ordered to pay for losses attributable to all 18 counts, not just the four to which he pleaded guilty); *United States v. Clark*, 931 F2d. 292 (5th Cir.1991) (Defendant who pleaded guilty to 4 of 22 counts was ordered to pay restitution for losses caused by all 22 counts. He appealed the denial of a Rule 35(a) motion and the appellate court, relying on *Hughey* and *Cockerham* remanded to calculate restitution related to the 4 counts only).

The only time the Fifth Circuit has not applied the mandate of *Hughey* has been in some cases in which scheme or conspiracy is an *element* of the offense charged. See: *United States v. Stouffer*, 986 F2d 916 (5th Cir.1993)

(Defendants convicted of mail fraud. Restitution not limited to losses caused by specific misrepresentations of defendants. Restitution for all losses caused by defendants' scheme upheld where: (a) the government had to prove scheme, (2) the indictment specifically described the parameters of the scheme, and (3) the jury implicitly found the existence of the scheme); *United States v. Chaney*, 964 F2d 437 (5th Cir.1992) (defendant convicted of scheme held jointly and severally liable for losses caused by her conduct and that of co-conspirator). The instant case does not fall within this narrow exception to *Hughey*. Although the prosecution couched Mr. Johnson's conduct in terms of a scheme, Mr. Johnson was not charged with nor convicted of participating in a scheme.[37] Scheme is not an element of the offense for which he was convicted and is not referenced in the indictment or judgment. The court did not instruct the jury to find Mr. Johnson concocted or participated in a scheme or conspiracy. As

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[37] During the trial, the prosecutor never argued that there was a scheme, however, he introduced evidence of similar acts and other alleged extraneous acts (under F. Rule Civ. P. 404(b)) to show "intent" and "motive." The government didn't argue "scheme" until they prepared the presentence report (Presentence Exhibit D, pg. 1). The government asserts "the scheme was devised and executed between 1978 and late 1984." *Id.* The government asserted the scheme was "to siphon funds from the bank in the form of kickbacks paid by a contractor during construction work for the bank on three separate projects." *Id.* so, the "scheme" became not only the 13 instances of specific conduct in the indictment, but every similar act he ever did. And the losses the government claimed included losses from all the fees Mr. Johnson ever received. (Presentence Exhibit D, pg. 8 and Transcript Exhibit H, pg. 227, ln. 9 – pg. 228.)

stated above, the indictment and judgment are clearly limited to specific offenses on specific dates. Therefore, the cases which help evaluate the validity of the restitution award at issue in this case, are those cases which hold in accordance with *Hughey*.

In the restitution cases discussed above which were remanded to reconsider the restitution awards, the government attempted to hold the defendants financially liable for all losses suffered by the victims as a result of the acts of the defendants regardless of whether the losses were related to the offenses of conviction. The restitution orders in these cases were uniformly struck down. However, unlike the instant case, the prosecution in those cases was at least attempting to hold the defendants liable for losses caused by the same kind of conduct which formed the basis of the convictions. (i.e. using stolen credit cards, cashing forged checks). In the instant case, there is certainly an element of the restitution related to this similar acts argument (taking fees not the subject of the indictment or the conviction), but the largest category of "losses" the government has ordered Mr. Johnson to pay is not even related to the criminal conduct of which he was convicted.[38] That is the money the bank allegedly "lost" from the lease of space in excess of that initially approved by the FDIC. A case has not been found which upholds ordering a defendant to pay such

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[38] The government also threw in alleged bad conduct regarding the lease of additional space; and asserted "losses from leases" in the amount of $4.172 million. (Transcript Exhibit H, pg. 227, ln. 24.)

remote losses, even if they can accurately be called "losses."

In *United States v. Clark*, 931 F2d. 292 (5th Cir. 1991), the trial court ordered the defendant to pay restitution for all losses related to the failure of a real estate development project even though the defendant pleaded guilty to only four counts of aiding and abetting the making of false statements to a federally insured bank to obtain four loans for the project. The trial court maintained that the pre-sentence report provided a sufficient basis for the restitution award and held the court was not bound by the defendant's plea bargain. *United States v. Clark*, 931 F2d. at 294. The Fifth Circuit apparently didn't agree stating "Offenses of conviction should be clear and not implied." *United States v. Clark*, 931 F2d. at 296. Holding that the defendant could only be held liable for the losses arising from the counts related to his plea and not for all losses suffered by the entire project, the Court remanded the case to determine an appropriate restitution award. *Id.*

Even assuming for the sake of argument that there was some "scheme" of Ruben Johnson related to the tenant finish-out, there is simply no way to tie the money the bank spent on leases to that scheme. And, even if for the sake of argument, there was some *overall* scheme, Mr. Johnson was not indicted for any scheme, scheme was not an element of the crimes charged, there was no evidence of a scheme, and the jury was not instructed to find a scheme. It simply was not part of the case.

Ordering Mr. Johnson to pay for losses not related to the offense of conviction also runs afoul of due process.

"To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." See *H.R. Rep. No. 99-334*, p. 7 (1985) (citing to H.R. Rep. No. 98-1017, p. 83, n. 43 (1984). *Hughey* at 1985, n. 5.

As correctly stated by the court in the instructions to the jury (see excerpt quoted on page 7 above), the indictment gives the defendant notice of the charges against him. In other words, the indictment lets the defendant know what he needs to defend against. Given the very specific indictment in this case, Mr. Johnson certainly had no notice he was to defend against charges that he caused the bank losses of in excess of 4 million dollars. Mr. Johnson had no notice of the additional non-indicted "charges" against him or of the enormity of the possible restitution. This lack of notice violates due process and Mr. Johnson's constitutional rights.

4. Government's Response Supports Motion.

The government's response to defendants' Motion to vacate, Set Aside or Correct Sentence supports Mr. Johnson's position in this motion. On January 27, 1992, Movant filed a Rule 2255 Motion to Vacate, Set Aside or Correct Sentence which in part focused on a multiplicity argument. That Motion was ultimately denied by this court on June 30, 1992. On March 26, 1992, the government filed a response to Movant's Motion ("the Government's Response"). It is illustrative to read the Government's Response because in it the Assistant U.S. Attorney concisely explains the counts of the indictment

against Mr. Johnson and the actions for which he was convicted. (Government's Response attached as Exhibit "C")

In discussing the charges and resulting conviction, all references by the U.S. Attorney in the response were to alleged "kickbacks received by Mr. Johnson." Actions of Mr. Johnson related to leasing of space in the United Bank Building were not addressed or argued as forming any basis for any of the counts of the indictment. Leases were not mentioned in the response. In fact, no actions of Mr. Johnson, other than accepting "kickbacks," were addressed.

In analyzing the indictment, the government went into great detail about the "kickbacks" paid to Mr. Johnson by the contractor, Zapalac. Each count was related to a specific "kickback" for work performed by Zapalac to the bank building, the mini-mall or the Congress Avenue building (all property the bank was leasing or was to lease). Each count was related to a specific date that Mr. Johnson received a fee and was claimed to be supported by a specific bank payment voucher. In summarizing its argument, the government stated:

> The evidence underlying Johnson's convictions clearly established thirteen separate and distinct misapplications by Johnson. Each count in the indictment alleged and evidence established facts which the counts did not require. The evidence established that *on the thirteen separate dates* set out in the indictment Johnson misapplied, that is, converted to his own use, bank funds. Further, the indictment factually described and the evidence proved the method utilized by Johnson to remove funds from the

> bank. Each count described *a particular United Bank of Texas expense voucher* through which Johnson caused the bank to fund him money. Further, the evidence demonstrated that Johnson converted a different amount *on each date.*

Government's Response Exhibit at pg. 6 & 7 (emphasis added).

There was no mention of leases, tenants or defaults. The crimes for which Mr. Johnson was indicted and convicted were, by the government's own conclusions, "kickbacks" of specific amounts of money on specific dates, supported by specific bank documents. That was how the government maintained Mr. Johnson converted bank funds. That is how the government defended the multiplicity argument, by urging that Mr. Johnson's conduct was *not* a scheme. The amounts of money allegedly converted by Mr. Johnson or "removed from the bank" as the government put it, can be the only losses caused by the conduct of Mr. Johnson. Those are the crimes for which he was convicted and the only amounts relevant to restitution.

Conclusion

Ruben Johnson was indicted on 13 separate counts misapplying "more than $100.00" through the funding of 13 separate and distinct expense vouchers of United Bank, on 13 specific dates, from Sept. 20, 1983 through Sept. 10, 1984. The vouchers were for tenant finish out work performed by a contractor George Zapalac on some of the space leased by the bank. The 13 vouchers listed in the indictment totaled $731,609.46. The evidence and

arguments propounded by the government in the case were that Mr. Johnson received a 15% fee for each of those vouchers (which the government argued was the "misapplication" in the charge). Simple math shows that 15% of $731,609.46 is $109,741.41. That is the only loss the government alleged and proved came from misapplication of funds from the 13 vouchers charged in the indictment and that is the only amount which the defendant should have been ordered to pay in restitution.

Yet the restitution ordered was $4,566,298.00. Of that, $394,298.00 was the loss the government claimed was due to misapplication of funds. That loss, however, included *all* alleged misapplications achieved through the funding of *all* expense vouchers the bank ever paid for tenant finish out on *all* its leased space, *from 1978 through 1984*. $284,556.59 of the $394,298.00 ordered in restitution for losses from misapplication of funds was related to "similar acts" not included in the indictments and not part of the offenses of conviction. The restitution related to the fees received by Mr. Johnson therefore should be reduced by $284,556.59 to $109,741.41.

The restitution ordered also included $4,172,000.00 in "losses" the bank allegedly suffered for payments on extra leases which the bank entered into between 1979 and 1982. There was no direct evidence of such losses in the trial, and there was no act of defendant charged in the indictment which had anything to do with the leases. Even though Mr. Johnson was convicted of accepting certain "kickbacks" from tenant finish out charges paid by the bank, it does not follow that he should also be ordered to pay restitution for the amount of rent the bank paid on the leases of the space where the tenant finish out

was performed or on other bank space. This simply does not compute. The restitution should be further reduced by this $4,172,000.00 figure. To recover this loss, the government would have had to charge Mr. Johnson with some wrongdoing in relation to the leases and this they did not do, likely because they had no basis in law or in fact to do so.

Because the losses to the victim were represented by the FDIC to be $4,566,298.00, instead of $109,741.41 as they should have been under the facts and law of this case, the severity of the crime, for purposes of setting the fine, the prison term and term of probation, were rated much higher than they would have been. Accordingly, this violated the due process rights of Mr. Johnson in that he served more time in prison (5 years) than he should have for the crimes charged. He has therefore paid his debt to society. Mr. Johnson respectfully requests this court take into consideration his time served, the amount of restitution paid to date and his community service given and: (1) vacate the restitution order for all amounts which exeed [sic] the amount he has paid to date; (2) vacate the fine, and (3) order his early release from probation. In the alternative, Mr. Johnson requests the restitution be reduced to $109,741.41, less amounts paid to date and that the $65,000 fine be vacated.

Prayer

It is respectfully requested that after due consideration, the court grant this Motion, vacate all restitution which exceeds the amount paid by defendant to date, vacate the fine in this case and release defendant from

probation. In the alternative, it is respectfully requested that the court reduce the restitution ordered to the amount related to the offenses of conviction. That amount is the 15 percent fee received through the funding of the specific expense vouchers referenced in the indictment ($109,741.41). Movant further requests that the court vacate the $65,000 fine ordered to be paid and grant such other relief as is just and equitable.

Respectfully submitted,

Denise P. Tomlinson
and Linda J. Stanley
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1202-D West 6th St.
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(512) 477-4800
(512) 477-4832 fax

By: /s/ Denise P. Tomlinson
Denise P. Tomlinson/
20121000

By: /s/ Linda J. Stanley
Linda J. Stanley/
19046250

ATTORNEYS FOR DEFENDANT

REQUEST FOR ORAL ARGUMENT

Movant respectfully requests oral argument.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Defendant's Motion to Correct Sentence was sent to the following on this 2nd day of September, 1997.

VIA HAND DELIVERY

James Blankinship
ASSISTANT U.S. ATTORNEY
816 Congress Avenue, #650
Austin, Texas 78701

VIA HAND DELIVERY

Mr. Ernest Garcia
ASSISTANT U.S. ATTORNEY
816 Congress Avenue, #1000
Austin, TX 78701

/s/ Denise P. Tomlinson
Denise P. Tomlinson

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8374
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUBEN JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-92-CA-058 (CR-88-00104-01)

(Filed May 6, 1993)

Before POLITZ, Chief Judge,
HIGGINBOTHAM, and DEMOSS, Circuit Judges.

PER CURIAM:*

Ruben Johnson was charged in a thirteen-count indictment and convicted by a jury for theft and misapplication of funds in violation of 18 U.S.C. § 656. During

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentencing, the district court ordered restitution of $4,566,298. Johnson directly appealed his conviction and sentence but later withdrew his appeal. Johnson then filed a 28 U.S.C. § 2255 motion, challenging the multiple-count indictment as violative of double jeopardy and the order of restitution as failing to comply with *Hughey v. United States*, 495 U.S. 411, 110 S.Ct. 1979, 1984, 109 L.Ed.2d 408 (1990). The district court denied Johnson's § 2255 motion, and Johnson appeals.

Relief under § 2255 is reserved for violations of a defendant's constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). Short of this, claims that could have been raised on direct appeal, but were not, may not be raised in a collateral proceeding. *Id.*

Johnson did not directly appeal the amount of restitution ordered by the district court even though he concedes that he raised objections to the alleged losses in district court. *Hughey*, a statutory construction case does not raise a constitutional issue. *See* 495 U.S. at 419. Although *Hughey*, decided after Johnson was sentenced, could not have been raised on direct appeal, the appropriateness of the amount of restitution could have been, but was not, raised on direct appeal. Instead, Johnson *affirmatively* moved to withdraw his appeal. His failure to appeal waived the factual issue as to the appropriateness of the amount of restitution. The district court's denial of Johnson's § 2255 motion in such circumstances would not "result in a complete miscarriage of justice."

A claim of multiple sentences in violation of the Double Jeopardy Clause is cognizable in a § 2255 proceeding. *See United States v. Marroquin*, 885 F.2d 1240, 1245-46 (5th Cir. 1989). The thirteen-count indictment charging Johnson with separate violations of § 656 was based on actions committed on different dates and thus conforms with *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Johnson's overall "scheme" to receive a 15% kickback does not preclude his multiple convictions based on each instance of misconduct under that scheme. *See United States v. Farmigoni*, 934 F.2d 63, 65 (5th Cir. 1991) (quotation omitted), *cert. denied*, 112 S.Ct. 1160 (1992).

The district court's denial of Johnson's § 2255 motion is AFFIRMED.

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RUBEN JOHNSON	§	CIVIL NO.
VS.	§	A-92-CA-058
	§	
UNITED STATES OF AMERICA	§	CRIMINAL NO.
	§	A-88-CR-104
	§	

ORDER

(Filed June 30, 1992)

Before the Court is a Motion to Vacate, Set Aside or Correct Sentence brought pursuant to 28 U.S.C. § 2255. This cause was referred to the United States Magistrate for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended, effective March 1, 1982. The Magistrate filed his Report and Recommendation on May 20, 1992. No objections have been filed to that Report and Recommendation. Objections to the Magistrate's Report and Recommendation were filed on June 15, 1992.

In light of the Petitioner's objections to the Magistrate's Report and Recommendation, the Court has undertaken a *de novo* review of the entire file in this cause and is of the opinion and finds that the Recommendation filed by the Magistrate in this cause is correct and should in all things be approved and adopted by the Court.

IT IS THEREFORE ORDERED that the United States Magistrate's Report and Recommendation filed in this cause is hereby approved and adopted by the Court, and that the Motion to Vacate, Set Aside or Correct Sentence is hereby DENIED.

SIGNED AND ENTERED this 30th day of June, 1992.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RUBEN JOHNSON	§	CIVIL NO.
VS.	§	A-92-CA-058
	§	
UNITED STATES OF AMERICA	§	CRIMINAL NO.
	§	A-88-CR-104

JUDGMENT

(Filed June 30, 1992)

This action came on for consideration before the Court, and the issues having been duly considered;

IT IS HEREBY ORDERED that the Motion to Vacate, Set Aside or Correct Sentence is hereby DENIED.

SIGNED AND ENTERED this 30th day of June, 1992.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

APPENDIX "I"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RUBEN JOHNSON, Movant	§	
v.	§	CIVIL NO. A-92-CA-058 (A-88-CR-104)
UNITED STATES OF AMERICA, Respondent.	§	

MOVANT'S OBJECTION TO REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

(Filed Jun. 15, 1992)

TO THE HONORABLE JAMES R. NOWLIN, UNITED STATES DISTRICT JUDGE:

The petitioner submits this response or objection to the Report and Recommendation of the United States Magistrate to the District Court pursuant to 28 USC § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective July 1, 1990.

I. RESTATEMENT OF THE CASE

Movant was indicted and convicted of thirteen counts of bank fraud. United Bank, United Bank Mall and

United Bank Branch Congress Avenue, were all entities, however United Bank Mall and United Bank Branch Congress Avenue were branches of United Bank and as such had no independent identifies. The scheme to defraud was a single scheme aimed to return fifteen percent (15%) of all finish work to Movant. All finish out work was undertaken to benefit United Bank solely.

II. ANALYSIS OF INDICTMENT

Clearly counts 1 through 4 are for the United Bank Mall, a project that encompassed finish out on a building that would ultimately be devoted entirely to banking activity. The funding for this finish out work came from the United Bank.

Movant was to receive 15% of all finish out work. The fact that the project costs were paid in installments does not detract from the overall scheme to charge 15% of the contractor's price. If an interim financing program had been utilized, then a single check from United Bank, encompassing all billing periods, would have been issued, and a single check would have been given to the contractor. The result would be the same. The Movant would receive 15% of the contract price.

III. RESTITUTION

The restitution ordered in this case exceeds the funds received by Movant ($109,741.41) and exceeds the total amount of all checks issued to Zapalac by United Bank in this scheme ($731,609.46). Restitution was ordered in the amount of $4,566,298.00, an amount inconsistent with the

indictment. The restitution provision of the Victim and Witness Protection Act of 1982 (VWPA) 18 U.S.C. §3579, 3580, authorizes federal courts, when sentencing defendants convicted of certain offenses, to order "in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense". 18 U.S.C. 3579 (a)(1).

Based on the language contained in VWPA §3579 and §3580, the court is not authorized to set restitution in an amount greater than the loss suffered by the victim (United Bank). The decision reached in *U. S. v. Bennett*, 943 F.2d 738, can be distinguished because *Bennett* was a case where the defendant entered into a plea bargain and agreed, as part of that plea, to make restitution of $137,000.00. In the instant case, Movant was found guilty and sentenced by the Court. In *Bennett* at 740, the Court ruled that when a Defendant is found guilty of a scheme, restitution for the entire scheme may be imposed. In the instant case, restitution could be ordered in the amount of $731,609.46. *Bennett* at 740, further provides that, "The scheme concept is by its nature an amorphous one, and may only support an award of restitution if it is defined with specificity. A contrary rule would allow vague allegations of a scheme to support restitution based upon broad unsubstantiated conduct. The language of the VWPA as interpreted in *Hughey* precludes such speculative awards".

Hughey at 1986 found that the restitution ordered was not authorized. In *Teague v. Lane* 109 S.Ct. 1075, the Court adopts the general rule that cases that have become final before new rules are adopted, will not be applied retroactively. Although *Teague* concerns itself with 28 U.S.C.

2254, which is directed at state confinement and state problems, it basically adopts the views of Justice Harlan and it specifically suggests that there are two exceptions to be applied in a collateral review situation. It is a second exception decided thereon at 1075 which is articulated in this decision by the following language: "That a new rule should be applied retroactively if it requires the observance of those procedures that are implicit in the concept of ordered liberty".

We submit that unauthorized restitution such as the restitution ordered herein meets the second test in *Teague* and should apply to all defendants who have similarly been ordered to make restitution for reasons beyond the scope of their indictments or for the schemes that they have been convicted of perpetrating. We therefore submit that the conclusion reached in *Bennett* is based primarily upon the fact that it was a plea bargain. This certainly is distinguishable from the case in point.

IV. RECOMMENDATION

We therefore urge the Court to grant the first part of a 2255 motion; that this was a single scheme as to counts 1 through 4 and that applying the decision reached in *US v. Lemons* to run those counts concurrently. We would

urge the Court to grant the relief in Part II and set the restitution figure at $109,741.42 or $731,609.46.

RESPECTFULLY SUBMITTED,

/s/ Burrell D. Johnston
BURRELL D. JOHNSTON
1108 NUECES
AUSTIN, TEXAS 78701
(512) 478-7381
STATE BAR #10848000
ATTORNEY FOR MOVANT,
RUBEN JOHNSON

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Movant's Objection to Report and Recommendation Of The United States Magistrate has been hand delivered to Jim Blankinship, Assistant United States Attorney, 816 Congress Avenue, Suite 650, Austin, Texas 78701 on this 15th day of June, 1992.

/s/ Burrell D. Johnston
BURRELL D. JOHNSTON

APPENDIX "J"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RUBEN JOHNSON,	()	
Movant	()	
	()	CAUSE NO.
VS.	()	A-92-CA-058
UNITED STATES OF AMERICA,	()	(A-88-CR-104)
	()	
Respondent.	()	
	()	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

(Filed May 20, 1992)

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective July 1, 1990.

Before the Court is the Movant's Motion to Vacate, Set Aside or Correct Sentence brought pursuant to 28 U.S.C. §2255.

I. STATEMENT OF THE CASE

The movant was indicted and convicted of thirteen (13) counts of band [sic] fraud. He alleges that his offense was one scheme to defraud one bank. Consequently the movant alleges that his conviction on 13 counts is multiplicitous and constitutes double jeopardy. The movant further alleges that the amount of restitution required of him is contrary to 28 U.S.C. §3580(a) and *Hughey v. United States,* 110 S.Ct. 1979, 1983 495 U.S. 411 (1990).

II. GOVERNMENT'S RESPONSE

The Government filed its response on March 26, 1991. The Government contends that the petitioner's allegations are without merit. The Government contends that because each count of the petitioner's indictment required proof of separate and distinct facts (such as dates, instrumentality, amount involved) multiplicity and double jeopardy do not apply in this case.

The Government further contends that the petitioner's complaint about the amount of restitution he is to pay is without merit. The Government contends that the petitioner has waived this issue by failing to raise it before the district court, both at sentencing and in a post-conviction motion. Moreover, the Government contends that the petitioner also failed to raise the issue before the appellate court by voluntarily withdrawing his appeal prior to filing an appellate brief therein. The Government contends that this issue may not be raised in a §2255 motion.

III. ANALYSIS

A. Multiplicity and Double Jeopardy

The petitioner claims that his kick-backs for "finishing out costs" was one scheme to defraud one bank; therefore there should have been only one count against him, not thirteen, and that the thirteen counts against him are multiplicitous and subject him to double jeopardy.

The Government contends that because each count of the indictment required proof of elements different from each other, the counts are not multiplicitous and double jeopardy does not apply. The Government further contends that the petitioner has waived this [sic] claims because he had not previously raised it before either the district or the appellate court.

In *United States v. Swaim*, 757 F.2d 1530, 1536 (5th Cir. 1985), the Fifth Circuit Court of Appeals held that:

> "Multiplicity" is the charging of a single offense in more than one count. *U.S. v. Free*, 574 F.2d 1221, 1224, n.3, (5th Cir.), *cert. denied*, 439 U.S. 873, 99 S.Ct. 209, 58 L.Ed.2d 187 (1978). "The test for determining whether the same act or transaction constitutes two offenses or only one is whether conviction under each statutory provision requires proof of an additional fact which the other does not." *Id.* at 1224 (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 308 (1932). Moreover, "[w]hether a continuous transaction results in the commission of but a single offense or separate offenses . . . is determined by whether separate and distinct prohibited acts, made punishable by

> law, have been committed." *U.S. v. Shaid*, 730 F.2d 225, 231 (5th Cir. 1984).
>
> . . . .
>
> Even if a single fact pattern were present, the "different evidence test," which requires proof of different facts and different elements as to each separate offense, would show that the counts in question are not multiplicitous. *U.S. v. Horsley*, 519 F.2d 1264, 1265 (5th Cir. 1975); *U.S. v. Hill*, 500 F.2d 733, 740 (5th Cir. 1954).

In the present case, only counts 7, 8 and 13 were based on finish out work performed on the United Bank Tower. Other counts involved two other construction projects: (1) a mini-mall in the former University State Bank Building on Guadalupe Street; and (2) a down-town Congress Avenue Branch bank building. Furthermore, each count involved a separate voucher, different dates, and different amounts; thus, each count required proof of separate and distinct facts, as required by *Blockburger*. Hence, the counts were not multiplicitous and double jeopardy does not attach.

Furthermore, the petitioner's reliance on *United States v. Lemons*, 941 F.2d 309 (5th Cir. 1991), is misplaced. That case concerns 18 U.S.C. §1344 and is not applicable to 18 U.S.C. §656, the statute under which the movant was convicted.

B. Restitution

The movant alleges that the loss suffered by the bank was $109,741.42 and that to require restitution of $731,609.46 exceeds that authorized by the applicable

statute, 18 U.S.C. §3580(a). The petitioner relies on *Hughey v. U.S.*, 495 U.S. 411, 110 S.Ct. 1979 (1990), for the proposition that restitution should not include losses other than those caused by the offense conviction and should be based on the amount of "loss sustained by any victim as a result of the offense."

The Government argues that the movant has waived this issue by failure to raise it previously before the district court or the appellate court and that he cannot now relitigate the restitution amount.

The Ninth Circuit Court of Appeals, in *United States v. Grewal*, 825 F.2d 220 (9th Cir. 1987), held that it would not consider the appellant's (Grewal's) contention regarding restitution because he had not raised it at the district court level. *See also United States v. Visman*, 919 F.2d 1390, 1394 (9th Cir. 1990), in which the court also declined to consider the question of restitution because it has not been presented to the district court.

Additionally, in *United States v. Bennett*, 943 F.2d 738, 741 (7th Cir. 1991), the Seventh Circuit Court of Appeals specifically held that *Hughey v. U.S.* could not be applied retroactively because "[T]he principle of finality . . . is essential to the operation of our criminal justice system." The Seventh Circuit Court quoted *Teague v. Lane*, 489 U.S. 288, 209 S.Ct. 2060, 1075, 103 L.Ed.2d 344 (1989).

IV. RECOMMENDATION

In light of the foregoing, the Magistrate Court RECOMMENDS that the District Court DENY the petitioner's §2255 Motion to Vacate, Set Aside, or Correct Sentence.

The movant may file objections to this recommendation. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a de novo review by the district court of the findings and recommendations in this report, *see* 28 U.S.C. §636(b)(1)(C), and shall bar an aggrieved party from attacking the findings and recommendations contained in this report on appeal, *see Nettles v. Wainwright*, 677 F.2d 404, 408-410 (5th Cir. 1982) (Unit B *en banc*). *See also Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435, 445 (1985) (rehearing denied) (bar of attack on appeal held constitutional and not in violation of Federal Magistrates Act).

The clerk is directed to mail a copy of this recommendation to movant, return receipt requested, and to all other parties by regular mail.

SIGNED and ENTERED this 20th day of May, 1992, at Austin, Texas.

/s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE JUDGE

APPENDIX "K"

United States District Court for the
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEFENDANT
RUBEN JOHNSON
2305 Woodlawn
Austin, Texas 78703
SSN 458-30-3914
DOCKET NO A-88-CR-104
USAO Number: 87-02695

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date →

MONTH	DAY	YEAR
July	20,	1989

COUNSEL
__ **WITHOUT COUNSEL**

However the court advised defendant of right to counsel and asked whether the defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

xx **WITH COUNSEL**

William White and Steve Brittain
(Name of Counsel)

PLEA

__ GUILTY, and the court being satisfied that there is a factual basis for the plea.

__ **NOLO CONTENDERE**, xx NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~ verdict of
__ **NOT GUILTY.** Defendant is discharged

xx **GUILTY.** as to Counts 1 through 13

Defendant has been convicted as charged of the offense(s) of on or about September 20, 1983, and continuing through on or about September 10, 1984, the defendant knowingly and with intent to defraud did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the monies, funds and credits belonging to United Bank of Texas the deposits of which were insured by the Federal Deposit Insurance Corporation in violation of Title 18 U.S.C. § 656 as charged in Counts 1 through 13 of the indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS and assessed a $5,000.00 fine on each of Counts 1 through 13 pursuant to Title 18 U.S.C. § 4205(a). IT IS FURTHER ORDERED that the defendant shall pay restitution in the amount of $4,566,298.00 pursuant to Title 18 U.S.C. § 3579 to compensate FDIC for losses incurred during the commission of the offense. IT IS FURTHER ORDERED that the sentences of imprisonment imposed on Counts 1 through 4 shall run consecutively to each other and the sentences imposed herein on Counts 5 through 13 shall run concurrently with each other

and consecutively to the sentences imposed on Counts 1 through 4. IT IS FURTHER ORDERED that the sentences of imprisonment imposed on each of Counts 5 through 13 are hereby SUSPENDED and the defendant placed on probation for a period of FIVE (5) YEARS WITH SUPERVISION pursuant to Title 18 adopted by the Judges of the Western District of Texas on November 15, 1987, and upon the following special conditions of probation:

SPECIAL CONDITIONS OF PROBATION

(1) The defendant shall pay the total fine in the amount of $65,000.00 to the Clerk, U.S. District Court, during the period of probation in regular monthly installments at the direction of the U.S. Probation Office.

(2) The defendant shall pay the total restitution in the amount of $4,566,298.00 to the Clerk, U.S. District Court, during the period of probation in regular monthly installments at the direction of the U.S. Probation Office.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The Court orders commitment to the custody of the Attorney General and recommends

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the US Marshal or other qualified officer.

/s/ James R. Nowlin
JAMES R. NOWLIN

July 20, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES	§	
OF AMERICA	§	CRIMINAL NO.
	§	A-88-CR-104
VS.	§	USAO NO.
RUBEN JOHNSON	§	87-02695

CONTINUATION OF JUDGMENT
AND PROBATION/COMMITMENT ORDER

(Filed Jul. 21, 1989)

(3) The defendant shall perform 500 hours of community service during the period of probation at the direction of the U.S. Probation Office.

IT IS FURTHER ORDERED that sentence imposed on Counts 5 through 13 shall commence immediately upon the completion of the sentences imposed herein on Counts 1 through 4.

FURTHER, pursuant to the provisions of Title 18 U.S.C. § 3565, the defendant shall notify the U.S. Attorney of any change in name or address.

The defendant is continued on his present bond pending designation of institution, and may voluntarily report to the institution as directed by the U.S. Marshal or the U.S. Probation Office.

TOTAL PERIOD OF IMPRISONMENT: EIGHT (8) YEARS

TOTAL RESTITUTION: $4,566,298.00

TOTAL PROBATION: FIVE (5) YEARS

TOTAL FINE: $65,000.00

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

DATED: JULY 20, 1989

APPENDIX "L"

* * *

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT SIX, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT SEVEN, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT EIGHT, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT NINE, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT TEN, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT ELEVEN, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT TWELVE, as charged in the Indictment. ("Guilty" or "Not Guilty")

We, the Jury, find the Defendant, **RUBEN JOHNSON** Guilty as to COUNT THIRTEEN, as charged in ("Guilty" or "Not Guilty")

the Indictment.

/s/ Delmar V. Mayes
FOREPERSON

4-24-89
DATE

APPENDIX "M"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. RUBEN JOHNSON Defendant.	CRIMINAL NO. A 88 CR 104 INDICTMENT [Violation: 18 USC 656 – Theft and Misapplication by Bank Officer/Director.] (Filed Sept. 6, 1988)

THE GRAND JURY CHARGES:

COUNT ONE
(18 U.S.C. 656)

At all times relevant:

1. United Bank of Texas was a bank organized and operating under the laws of the State of Texas. The deposits of the bank were insured by the Federal Deposit Insurance Corporation.

2. Defendant Ruben Johnson was the Chief Executive Officer and Chairman of the Board of Directors of United Bank of Texas.

3. On or about September 20, 1983, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the money, funds and credits belonging to

the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $31,529.64, in violation of Title 18, United States Code, Section 656.

COUNT TWO
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about October 18, 1983, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $55,287.09, in violation of Title 18, United States Code, Section 656.

COUNT THREE
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about November 17, 1983, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $56,998.50, in violation of Title 18, United States Code, Section 656.

COUNT FOUR
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about December 13, 1983, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $34,616.66, in violation of Title 18, United States Code, Section 656.

COUNT FIVE
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about February 16, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $55,805.06, in violation of Title 18, United States Code, Section 656.

COUNT SIX
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about March 2, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $21,981.81, in violation of Title 18, United States Code, Section 656.

COUNT SEVEN
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about March 15, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $80,308.92, in violation of Title 18, United States Code, Section 656.

COUNT EIGHT
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about May 3, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in

the approximate amount of $36,161.11, in violation of Title 18, United States Code, Section 656.

COUNT NINE
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about June 7, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $123,312.47, in violation of Title 18, United States Code, Section 656.

COUNT TEN
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about July 6, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more

than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $40,175.72, in violation of Title 18, United States Code, Section 656.

COUNT ELEVEN
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about August 20, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $49,280.27, in violation of Title 18, United States Code, Section 656.

COUNT TWELVE
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about September 6, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in the approximate amount of $108,420.44, in violation of Title 18, United States Code, Section 656.

COUNT THIRTEEN
(18 U.S.C. 656)

1. Paragraphs one and two of Count One are hereby realleged and incorporated as though fully set forth herein.

2. On or about September 10, 1984, in the Western District of Texas, Defendant,

RUBEN JOHNSON,

knowingly and with intent to defraud, did abstract, purloin, willfully misapply and cause to be misapplied more than $100.00 of the moneys, funds and credits belonging to the bank and intrusted to its care and custody through the funding of a United Bank of Texas expense voucher in

the approximate amount of $37,731.77, in violation of Title 18, United States Code, Section 656.

A TRUE BILL:

/s/ Illegible
FOREMAN

HELEN MILBURN EVERSBERG
United States Attorney

/s/ James Blankinship
JAMES BLANKINSHIP
Assistant U. S. Attorney

APPENDIX "N"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
Plaintiff,	§	CRIMINAL NO.
	§	A-88-104-CR
v.	§	
	§	
RUBEN JOHNSON	§	
	§	
Defendant.	§	

* * *

[p. Vol. 3 – 222] there's some bond already set in this case.

MR. WHITE: There is, Your Honor.

THE COURT: And what is that bond?

MR. WHITE: I believe it's five thousand dollars. Fifty-thousand-dollar bond.

THE COURT: The court will allow the defendant to remain on the existing bond pending sentencing, unless the government has some objection to that.

MR. BLANKINSHIP: We don't, Your Honor.

THE COURT: Anything else at this time?

MR. WHITE: No, Your Honor.

THE COURT: All right. Counsel, you may be excused. I encourage courage you to go up and talk to the jurors and find out – they wanted to talk to you. First time that's ever happened.

All right. Thank you very much. The court will stand in recess.

* * *

JULY 20, 1989

THE CLERK: The court now calls A-88-CR-104, United States of America versus Ruben Johnson, for sentencing.

MR. BLANKINSHIP: Jim Blankinship and Jerry Carruth for the government, Your Honor.

MR. WHITE: Bill White and Steve Brittain for Mr. Johnson.

[p. Vol. 3 – 223] THE COURT: All right. Mr. Johnson and Mr. Brittain and Mr. White, if you would come forward, please.

Mr. Ruben Johnson, you went to trial before this court on April 17th, 1989, and you were found guilty by a jury on April 24th, 1989. And you're now before the court for sentencing.

Mr. Johnson, have you had an opportunity to review the presentence investigation report in your case?

MR. JOHNSON: Yes, sir, I have. And I've signed that. I have reviewed it. I've asked my attorneys to make certain motions relative to allegations in the report, which I understand they have done.

THE COURT: All right, sir. Mr. White, have you had an opportunity to review the presentence investigation report in this case?

MR. WHITE: I have, Your Honor.

THE COURT: Do you have any comments or corrections that you want to make with regard to the presentence investigation report?

MR. WHITE: No, Your Honor, other than the written objections that I filed as a matter of record to the court.

THE COURT: My impression of the written objections – and the court has a government sentencing memorandum in this case, as well as written objections to the presentence report filed by the defendant as well as a presentence memorandum filed by the defendant.

[p. Vol. 3 – 224] The court has reviewed those. But my impression of these objections, Mr. White, is that you – the defendant disputes some of the inclusions of the probation officer with regard to some of the business organizations or financial arrangements which the defendant has made or attempted to make with regard to some of his assets. Is that correct?

MR. WHITE: We do. Yes, that's true, Your Honor.

THE COURT: Is there anything in these objections that you feel is necessary for the court to make any ruling on with regard to its consideration of the presentence report in sentencing?

MR. WHITE: Your Honor, I have specifically on Page 4 of the written objections to the presentence report, Mr. Johnson specifically objects to the information contained in the victim impact statement as to the amount of loss caused by criminal behavior.

In that regard, we have asked the court to make findings as to the value. As you know, Mr. Johnson was indicted, convicted for the fifteen per cent kickbacks on the tenant finish out of the bank building.

As part of the victim impact statement, it talks about the losses caused by Mr. Johnson in excess of twenty-one million dollars. Some of those losses have to do with seventeen million dollars worth of loans that were made to various people.

There was also some substance about four million dollars [p. Vol. 3 – 225] worth of space that the bank paid for to lease. Doesn't indicate in that victims impact statement whether or not that that's criminal behavior or not. But that might be concluded when the parole board looked at that as a money value. And that money value makes a significant difference to Mr. Johnson, should he be incarcerated, and his parole date.

We have made – asked that the court make written findings as to that amount of loss caused by Mr. Johnson proved up as a result of a criminal behavior, not behavior that happens as a result of a downturning in the economy or bad business judgment or other losses the bank had suffered, but the criminal behavior of Mr. Johnson.

THE COURT: The paragraph to which you refer is on Page – Pages 11 and 12, or paragraphs to which refer are on Page 11 and 12 of the presentence report, is that correct, under victim impact statement?

MR. WHITE: That's correct, Your Honor.

THE COURT: And that paragraph indicates that the attorney representing the F.D.I.C. in a civil action

against this defendant arising out of actions, some of his actions as chairman and chief executive officer of United Bank estimates loss caused by the defendant 'as follows'. And I assume what follows thereafter are estimates by the F.D.I.C. as to the losses arising out of his actions.

This does not indicate they're necessarily criminal [p. Vol. 3 – 226] actions, is that correct?

MR. WHITE: That's correct, Your Honor.

THE COURT: All right. It indicates that the F.D.I.C. has outlined three ways in which Mr. Johnson wrongfully took money from the bank and has computed approximate loss from each and that the period covered is from January of '82 to June of '87.

They refer to the space leased by the bank that was in excess of the space approved by the F.D.I.C. needed by the bank, the space that the bank never wanted or used, resulted in charges to the bank, according to this calculation, of 4.172 million dollars.

In this figure, the F.D.I.C. has given credit for fifty-two per cent of its total space as having been sublet to other businesses. This figure does not include the finishing out cost charged to the bank, which was substantial or any other cost for increased taxes, insurance, et cetera, that the bank had to pay for the extra space.

In regards to the kickbacks paid by the bank, that totals is $394,298. The F.D.I.C. also claims losses to the bank for approximately seventeen million dollars as a result of insider loans made by Johnson to himself and to various friends and business partners, this amount is not included in the restitution.

The total estimated loss to the bank from Mr. Johnson's [p. Vol. 3 – 227] actions is in excess of 21.5 million dollars. Of this amounts $4,566,298 is recoverable under the Witness Victim Protection Act.

You're disputing that figure, that final figure of 4.5 million dollars?

MR. WHITE: That's correct, Your Honor.

THE COURT: All right. Mr. Blankinship, do you have any comment you want to make about that?

MR. BLANKINSHIP: Yes, Your Honor. We think that figure is quite conservative. As is mentioned in the prosecution version, and as was developed in the evidence in this case, Mr. Johnson, in his own sworn interrogatories, admitted kickbacks, and I'm having a little difficulty – admitted kickbacks from George Zapalac on the bank leasehold of $471,562.07.

Now, the F.D.I.C. presented the figure to the probation office of $394,298 on the victim impact statement, because that's what they could document.

It seems to me that we're being rather kind to Mr. Johnson on this aspect of the case, because he – in an exhibit that was placed into evidence, Mr. Johnson's own sworn interrogatories, he admits the amount of kickbacks was, oh, about $80,000 more than what we're asking for in restitution on kickback.

With regard to the extra lease space, that is, the 4.172 million dollars, there was a great deal of time during the trial [p. Vol. 3 – 228] dedicated to demonstrating to the jury that Mr. Johnson caused the bank to lease this excessive amount of space at great cost to the bank.

That was a part of his fraud. That was a part of the evidence. And that ought to be a part of the restitution.

THE COURT: And all of that is calculated, and nothing else is included in this 4.5 million-dollar figure?

MR. BLANKINSHIP: That is correct, Your Honor. Excuse me. There was two thousand dollars worth of kickbacks on the Congress Avenue location which Mr. Johnson has claimed that he paid. We're giving him credit for that.

And then there was also approximately $35,000 worth kickbacks on the mini mall project, and that is also included in the amount of restitution by – I understand that's in there.

THE COURT: All right. Anything further on this point, Mr. White?

MR. WHITE: No, Your Honor.

THE COURT: The court finds that the information contained in the presentence report in the paragraph beginning on Page 11 and the paragraphs concluding on Page 12 under victim impact statement are accurate to the best of the ability of the government and those investigators to determine a figure and overrules any objection to the information contained therein.

Anything else that you want the court to rule on with regard to these objections?

[p. Vol. 3 – 229] MR. WHITE: No, Your Honor, other than what I've stated in the memorandum.

THE COURT: Mr. Johnson, now is the time, if you care to, to make any statement or comment you

might desire to make in your own behalf or to present any information you might want to present to the court in mitigation of punishment.

Anything that you would like to say to the court will be accepted at this time.

MR. JOHNSON: Thank you, Your Honor. I first want to express my appreciation to you for the careful and patient concern that you enforced to select a jury in my trial, my recent trial.

I'm sincerely grateful for the vigilant efforts that you made to protect my rights, and I'm very very grateful for that.

Judge Nowlin, I'm fifty-nine years old. And all my life, I have strongly believed in this country's justice system. I've not changed my mind at this point, because the system has found against me.

I'm devastated and humiliated that I'm in this situation before this court at this stage of my life. I'm troubled and concerned that I did not use the good sense to avoid this disaster.

In the last five years, my world has just been a nightmare of failure, defeat, loss and humiliation. I've lost my dreams for success and my hope for financial security and my deep

* * *

[p. Vol. 3 – 236] Pryor.

The lawyers have been kind enough to provide me a list of them. I have read them. And I note that you have many friends in the community who are saddened by

your conviction and by the fact that you have committed offenses and have asked the court to be lenient on you. And I think you can be proud of that fact, that you have that number of friends who are willing to stand up for you and speak up for you when you're in difficulty like this.

Those are things that are not material possessions. They're important, but they're things that you cannot count or value in monetary ways. There are a lot of good things, apparently, you've done in your lifetime. A lot of them you have been able to do, because you have had the material ability to do them.

Unfortunately, some of the reason why you had that material ability appears to be that you have, on occasion, taken liberties with the law in order to gain some of those possessions.

Based on all those considerations then, Mr. Johnson, it's the judgment of this court that with regard to Counts 1, 2, 3 and 4 that you be sentenced to the custody of the Attorney General or his authorized representative for a term of two years on each count, and a fine imposed on each of those counts in the amount of five thousand dollars as to each count pursuant to [p. Vol. 3 – 237] Title 18, United States Code, Section 4205(a).

It's the further judgment of this court that with regard to Counts 1 through 4 that the sentences of confinement imposed run consecutively to each other.

In addition, the court is going to require you to pay restitution in the amount of $4,566,298.00 to the Federal Deposit Insurance Corporation.

With regard to Counts 5 through 13, it's the judgment of this court that you be sentenced to the custody of the Attorney General or his authorized representative for a term of two years on each count, to run consecutively to the terms imposed in Counts 1 through 4, but to run concurrently to each other, and that a fine be imposed on each of those counts in the amount of five thousand dollars per count.

It's the further judgment of this court that the execution of the term of confinement imposed in Counts 5 through 13 be suspended, you be placed on probation with supervision for a period of five years pursuant to Title 18, United States Code, Section 3651.

The term of probation imposed as to Counts 5 through 13 is to commence upon your completion of the sentences imposed in Counts 1 through 4.

The court further reiterates in these counts that the court imposes restitution in the amount of $4,566,298.00.

The total term of confinement, therefore, Mr. Johnson, is a [p. Vol. 3 – 238] term of eight years. Total restitution is an amount of $4,566,298.00. The total term of probation is a period of five years.

Mr. Johnson, there are several special conditions of probation that the court is going to impose with regard to Count 5 through 13.

The first condition is that you pay the total fine on each count, that is, five thousand dollars per count, Counts 1 through 13, the total amount of $65,000.00 during the period of probation, if not before.

The second condition is that you pay restitution in the total amount of $4,566,298.00.

The court is going to enter an order of restitution which reads as follows: "Pursuant to Title 18, United States Code, Section 3579 of the Victim and Witness Protection Act of 1982, the defendant is ordered to pay $4,566,298.00 restitution to compensate the F.D.I.C., 1910 Pacific Avenue, Suite 1200, Dallas Texas, 75120, for losses incurred during the commission of the offense.

"The defendant will make equal installment payments as determined by the United States Probation Office in order that restitution will be totally paid as soon as practical, but in no event will the time period exceed five years excluding any period of confinement."

Do you understand that, Mr. Johnson? Do you understand

* * *

[p. Vol. 3 – 242] filed with the clerk within that same ten-day period I just mentioned, or else it may not be considered by the court.

Mrs. Jones will hand to you a letter over my signature which more specifically sets out your appeal rights, and the clerk's office will provide you or your attorneys with the appropriate forms for the preparation of an appeal if you desire to do so upon request.

Alll right. You may be excused.

MR. WHITE: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

8-11-89 /s/ Lynn D. Teter